



LIBRARY OF CONGRESS

Copyright Office

37 CFR Part 201

[Docket No. 2018-8]

Noncommercial Use of Pre-1972 Sound Recordings That Are Not Being Commercially Exploited

AGENCY: U.S. Copyright Office, Library of Congress.

ACTION: Notice of proposed rulemaking.

SUMMARY: The U.S. Copyright Office (“Copyright Office” or “Office”) is issuing a notice of proposed rulemaking regarding the Classics Protection and Access Act, title II of the recently enacted Orrin G. Hatch–Bob Goodlatte Music Modernization Act. In connection with the establishment of federal remedies for unauthorized uses of sound recordings fixed before February 15, 1972 (“Pre-1972 Sound Recordings”), Congress also established an exception for certain noncommercial uses of Pre-1972 Sound Recordings that are not being commercially exploited. To qualify for this exemption, a user must file a notice of noncommercial use after conducting a good faith, reasonable search to determine whether the Pre-1972 Sound Recording is being commercially exploited, and the rights owner of the sound recording must not object to the use within 90 days. After soliciting public comments through a notice of inquiry, the Office is proposing regulations identifying the specific steps that a user should take to demonstrate she has made a good faith, reasonable search. The proposed rule also details the filing requirements for the user to submit a notice of noncommercial use and for a rights owner to submit a notice objecting to such use.

DATES: Written comments must be received no later than 11:59 p.m. Eastern Time on [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE **FEDERAL REGISTER**]. Meeting requests must be received no later than 11:59 p.m. Eastern Time on March 18, 2019, and all meetings must take place no later than Friday, March 22, 2019. The Office will not consider requests to hold meetings after that date. So that the Copyright Office is able to meet the statutory deadlines set forth in the Music Modernization Act, no further extensions of time will be granted in this rulemaking.

ADDRESSES: For reasons of government efficiency, the Copyright Office is using the regulations.gov system for the submission and posting of public comments in this proceeding. All comments are therefore to be submitted electronically through *regulations.gov*. Specific instructions for submitting comments are available on the Copyright Office's website at <https://www.copyright.gov/rulemaking/pre1972-soundrecordings-noncommercial/>. If electronic submission of comments is not feasible due to lack of access to a computer and/or the internet, please contact the Office using the contact information below for special instructions.

FOR FURTHER INFORMATION CONTACT: Regan A. Smith, General Counsel and Associate Register of Copyrights, by email at regans@copyright.gov or Anna Chauvet, Assistant General Counsel, by email at achau@copyright.gov. Each can be contacted by telephone by calling (202) 707-8350.

SUPPLEMENTARY INFORMATION:

I. Background

On October 11, 2018, the president signed into law the Orrin G. Hatch–Bob Goodlatte Music Modernization Act, H.R. 1551 (“MMA”). Title II of the MMA, the

Classics Protection and Access Act, created chapter 14 of the copyright law, title 17, United States Code, which, among other things, extends remedies for copyright infringement to owners of sound recordings fixed before February 15, 1972 (“Pre-1972 Sound Recordings”). Under the provision, rights owners may be eligible to recover statutory damages and/or attorneys’ fees for the unauthorized use of their Pre-1972 Sound Recordings if certain requirements are met. To be eligible for these remedies, rights owners must typically file schedules listing their Pre-1972 Sound Recordings (“Pre-1972 Schedules”) with the U.S. Copyright Office, which are indexed into the Office’s public records.¹ The filing requirement is “designed to operate in place of a formal registration requirement that normally applies to claims involving statutory damages.”²

The MMA also creates a new mechanism for members of the public to obtain authorization to make noncommercial uses of Pre-1972 Sound Recordings that are not being commercially exploited. Under section 1401, a person may file a notice with the Copyright Office and propose a specific noncommercial use after taking steps to determine whether the recording is, at that time, being commercially exploited by or under the authority of the rights owner.³ Specifically, before determining that the recording is not being commercially exploited, she must first undertake a “good faith, reasonable search” of both the Pre-1972 Schedules indexed by the Copyright Office and music services “offering a comprehensive set of sound recordings for sale or streaming.”⁴ At that point, she may file a notice identifying the Pre-1972 Sound Recording and nature

¹ 17 U.S.C. 1401(f)(5)(A)(i)(I)–(II).

² H.R. Rep. No. 115-651, at 16 (2018); *see* S. Rep. No. 115-339, at 18 (2018).

³ 17 U.S.C. 1401(c)(1)(A)–(B).

⁴ *Id.* at 1401(c)(1)(A).

of the intended noncommercial use with the Office (a “notice of noncommercial use” or “NNU”).⁵ The Office will index this notice into its public records.⁶

In response, the rights owner of the Pre-1972 Sound Recording may file a notice with the Copyright Office “opting out” of (*i.e.*, objecting to) the requested noncommercial use (“Pre-1972 Opt-Out Notice”), and if the user nonetheless engages in the noncommercial use, such use may subject the user to liability under section 1401(a) if no other limitation on liability applies.⁷ The rights owner of the Pre-1972 Sound Recording has 90 days from when the NNU is indexed into the Office’s public records to file a Pre-1972 Opt-Out Notice.⁸ If, however, the rights owner does not opt-out within 90 days, the user may engage in the noncommercial use of the Pre-1972 Sound Recording without violating section 1401(a).⁹

Under the Classics Protection and Access Act, the Copyright Office must issue regulations identifying the “specific, reasonable steps that, if taken by a [noncommercial user of a Pre-1972 Sound Recording], are sufficient to constitute a good faith, reasonable search” of the Office’s records and music services to support a conclusion that a relevant Pre-1972 Sound Recording is not being commercially exploited.¹⁰ A user following the “specific, reasonable steps” identified by the Office will satisfy the statutory requirement of conducting a good faith search, even if the sound recording is later discovered to be commercially exploited.¹¹ Other searches may also satisfy this statutory requirement, but

⁵ *Id.* at 1401(c)(1)(B).

⁶ *Id.* at 1401(c)(1)(C).

⁷ *Id.* at 1401(c)(1).

⁸ *Id.* at 1401(c)(1)(C).

⁹ *Id.* at 1401(c)(1).

¹⁰ *Id.* at 1401(c)(3)(A).

¹¹ *Id.* at 1401(c)(4)(B).

the user would need to independently demonstrate how she met the requirement if challenged.¹²

The Office must also issue regulations “establish[ing] the form, content, and procedures” for users to file NNUs and rights owners to file Pre-1972 Opt-Out Notices.¹³

On October 16, 2018, the Office issued a notice of inquiry (“NOI”) soliciting comments regarding the specific steps a user should take to demonstrate she has made a good faith, reasonable search.¹⁴ The Office also solicited comments regarding the filing requirements for the user to submit an NNU and for a rights owner to submit a Pre-1972 Opt-Out Notice objecting to such use.¹⁵ In response, the Office received ten initial comments and fifteen reply comments, which are discussed further below.¹⁶ Having reviewed and carefully considered the comments, the Office now issues a proposed rule and invites further public comment.

II. Proposed Rule

This document (the “NPRM”) proposes regulatory language regarding three specific areas: (i) the “specific, reasonable steps that, if taken by a [noncommercial user of a Pre-1972 Sound Recording], are sufficient to constitute a good faith, reasonable search” to support a conclusion that a relevant Pre-1972 Sound Recording is not being commercially exploited¹⁷; (ii) the form, content, and procedures for a user, having made

¹² *Id.* at 1401(c)(4)(A)–(B).

¹³ *Id.* at 1401(c)(3)(B), (5)(A).

¹⁴ 83 FR 52176 (Oct. 16, 2018).

¹⁵ *Id.* at 52176.

¹⁶ The comments received in response to the NOI are available online at <https://www.regulations.gov/docketBrowser?rpp=25&so=DESC&sb=commentDueDate&po=0&dct=PS&D=COLC-2018-0008>. References to these comments are by party name (abbreviated where appropriate), followed by either “Initial” or “Reply,” as appropriate.

¹⁷ 17 U.S.C. 1401(c)(3)(A).

such a search, to file an NNU; and (iii) the form, content, and procedures for a rights owner to file a Pre-1972 Opt-Out Notice.¹⁸

In proposing the following regulatory language, the Office also confirms, as requested by multiple commenters, that the noncommercial use exception under section 1401(c) is supplementary, and does not negate other exceptions and limitations that may be available to a prospective user, including fair use and the exceptions for libraries and archives.¹⁹ Section 1401(f) separately provides that “the limitations on the exclusive rights of a copyright owner described in section 107, 108, 109, 110, and 112(f) shall apply to a claim under [section 1401(a)] with respect to a sound recording fixed before February 15, 1972,” as well as the section 512 limitation on liability relating to material online.²⁰ Further, section 1401(c) states that whether “a person files notice of a noncommercial use of a sound recording” or “a rights holder opts out of a noncommercial use of a sound recording,” that “does not itself enlarge or diminish any limitation on the exclusive rights of a copyright owner described in section 107, 108, 109, 110, or 112(f) as applied to a claim under [section 1401(a)].”²¹ These other exceptions and limitations are available to users whether or not they claim the exception for noncommercial use.²²

Regarding fair use specifically, the Office notes that although certain noncommercial

¹⁸ The proposed rule also confirms that 37 CFR 201.4 does not govern the filing of NNUs and Pre-1972 Opt-Out Notices. Similarly, the proposed rule makes a technical edit to reflect that the filing of notices of use of sound recordings under statutory license (17 U.S.C. 112(e), 114) are not governed by 37 CFR 201.4.

¹⁹ See ARSC Reply at 1 (addressing interplay between section 1401(c) and section 107); Music Library Association Initial at 1 (same); Electronic Frontier Foundation (“EFF”) Initial at 2 (same); Future of Music Coalition (“FMC”) Reply at 2 (same); Library Copyright Alliance (“LCA”) Initial at 1–2 (addressing interplay between section 1401 and section 108).

²⁰ 17 U.S.C. 1401(f)(1)(A); (3).

²¹ *Id.* at 1401(c)(2)(C), (c)(5)(B).

²² See EFF Initial at 2 (“The Copyright Office should emphasize . . . that fair use will apply (or not) regardless of whether a potential user files a notice of use, and regardless of whether a rightsholder opts out.”).

uses may constitute fair use, not all may be fair; instead, courts will balance the purpose and character of the use against the other fair use factors.²³

Similarly, multiple stakeholders commented that the noncommercial use exception should not affect application of the section 108(h) exception available for libraries and archives performing a reasonable investigation regarding the availability of published works in the last twenty years of their copyright term.²⁴ These commenters rightly note that sections 1401(c) and 108(h) contain differing statutory criteria regarding the type of search or investigation that must be made before making use of the respective exceptions, and the present rulemaking is focused on administering the exception for Pre-1972 Sound Recordings under section 1401(c).²⁵ Moreover, section 108(h) is not limited to sound recordings (much less Pre-1972 Sound Recordings); as discussed below, the proposed regulations governing a “good faith, reasonable search” for purposes of section 1401(c) specifically consider the various ways sound recordings are brought to market.

Finally, the Copyright Office keenly appreciates that “some of the users hoping to use [Pre-1972 Sound Recordings] may not have much copyright law background.”²⁶ In connection with the Office’s overall public information and education initiatives and the

²³ See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 584–85 (1994) (noting “the commercial or nonprofit educational character of a work is ‘not conclusive’” to fair use (quoting *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 448 (1984))); H.R. Rep. No. 94–1476, at 66 (1976) (same).

²⁴ See Copyright Alliance Initial at 2 n.3 (stating that “any conclusions made in determining what constitutes a ‘good faith, reasonable search’ for commercial exploitation of a pre-72 sound recording [do] not have any bearing on the meaning or scope of the ‘reasonable investigation’ requirement within Section 108(h)”); LCA Initial at 1–2 (stating that section 1401 procedures should not apply to libraries and archives employing section 108(h)); American Association of Independent Music (“A2IM”) & Recording Industry Association of America, Inc. (“RIAA”) Reply at 9 (“[W]e agree with LCA that there is not an exact match between the language in Sections 1401(c) and 108(h) regarding the nature of the search that must be conducted before the relevant provision becomes applicable.”).

²⁵ See, e.g., Copyright Alliance Initial at 3; LCA Initial at 2.

²⁶ FMC Reply at 6; see also AAU Initial at 1.

promulgation of a final rule, the Office intends to prepare additional public resources regarding Pre-1972 Sound Recordings and the new noncommercial use exception, including potentially a public circular. By the same token, the Office appreciates A2IM and RIAA's view that "the average person knows full well how to construct an effective Internet search designed to uncover a very specific item or information for which they are looking," and so while the proposed rule does not presume an expertise in copyright, it does presume a functional search capability on the part of a human user.²⁷

A. Good Faith, Reasonable Search

The proposed rule identifies five steps (six in the case of Alaska Native and American Indian ethnographic sound recordings) that, if taken, will support a conclusion that a relevant Pre-1972 Sound Recording is not being commercially exploited.²⁸ Consistent with the statute's directive to provide "specific" steps that are "sufficient, but not necessary" to demonstrate a Pre-1972 Sound Recording is not being commercialized, the rule adopts a "checklist"²⁹ approach for users to search across categories rather than an "open-ended" approach to better provide certainty to users.³⁰ The proposed rule divides various types of sources into different categories, and requires users to progressively search in each category (if and until a match is found, with a match evidencing commercial exploitation of the Pre-1972 Sound Recording).³¹ Categories to

²⁷ A2IM & RIAA Reply at 10; *see also* Internet Archive Initial at 1 ("Human searchers should be able to search a couple of services quite thoroughly.").

²⁸ 17 U.S.C. 1401(c)(3)(A).

²⁹ Copyright Alliance Initial at 3 (suggesting the checklist "should represent the *minimum* requirements of a reasonable search and recognize that each individual case will be different and will likely require additional steps").

³⁰ EFF Reply at 3 (suggesting that an open-ended rule "would give potential users no added certainty, making the safe harbor meaningless"); *see* Wikimedia Foundation Reply at 2 (same).

³¹ *See* A2IM & RIAA Initial at 4 (describing category-based search structure).

be searched are listed in recommended search order, to reduce the likelihood of duplicative searching.³² Because in some cases, the type of recording (*e.g.*, classical music, jazz, or ethnographic sound recordings) may warrant searching an additional resource or more particularized search criteria, such additional criteria are included on a tailored basis, as applicable to a particular genre.

In short, the rule proposes searching the following:

1. The Copyright Office's database of Pre-1972 Schedules;
2. One of the following major search engines: Google, Yahoo!, or Bing;
3. One of the following major streaming services: Amazon Music Unlimited, Apple Music, Spotify, or TIDAL;
4. The SoundExchange ISRC database;
5. Amazon.com, and, where the prospective user reasonably believes the recording implicates a listed niche genre, an additional listed retailer of physical product; and
6. In the case of ethnographic Pre-1972 Sound Recordings of Alaska Native or American Indian tribes or communities, searching through contacting the relevant tribe, association, and/or holding institution

The NOI generated a wide range of helpful comments from a rich variety of perspectives, and the proposed rule represents a compromise amongst those views. While this NPRM will no doubt draw out additional thoughtful comments, the Office is optimistic that this proposed rule strikes an appropriate balance, achieving the goal of crafting a practical rule with steps that are reasonable to expect of an individual user, yet exhaustive enough to qualify that user for a safe harbor as to the search's sufficiency from the perspective of rights owners' interests. Although a range of stakeholders agreed in principle with this goal,³³ views differed as to how many steps should constitute a

³² See *id.* at 4, 7 (proposing prioritized search from "broad" to "narrow" categories and methodology that minimizes "duplicative searches"); Public Knowledge Initial at 2 (advocating avoidance of "duplicative" searching).

³³ See, *e.g.*, Public Knowledge Initial at 2 ("The goal is . . . to strike a practical balance between the interests of rights owners and potential users."); A2IM & RIAA Reply at 2 ("[T]he Office has

“good faith, reasonable search.” For example, Public Knowledge suggested that users need only search the Office’s database of Pre-1972 Schedules and “no more than one to two” streaming services,³⁴ while A2IM and RIAA proposed nine categories of steps to be searched.³⁵ In synthesizing the public comments, the Copyright Office notes that the statute expressly contemplates searching on multiple services, including those offering sound recordings “for sale”³⁶ in addition to streaming services, and a congressional report characterizing the search requirement as “robust.”³⁷

In proposing this rule, the Copyright Office is also mindful of the individual and smaller-group interests from both rights owner and licensee or other user perspectives. The Office is concerned that limiting sources to be searched to only the most commercially popular services might obscure perspectives of “smaller, less mainstream creators” and independent services who themselves play a vital role in ensuring that a diverse array of cultural contributions are created and made available to the public.³⁸ As FMC notes, artists may deliberately “target niche markets and collectors—sometimes with careful remastering and extensive historical information,” or may opt not to make

an obligation to respect and preserve the careful balance struck by Congress in enacting Section 1401(c).”).

³⁴ Public Knowledge Initial at 5, App.

³⁵ A2IM & RIAA Initial at 4–6.

³⁶ 17 U.S.C. 1401(c)(1)(A)(ii); *see id.* at 1401(c)(3)(A) (directing the Register to issue regulations identifying “services offering a comprehensive set of sound recordings for sale or streaming” to be searched).

³⁷ Report and Section-by-Section Analysis of H.R. 1551 by the Chairmen and Ranking Members of Senate and House Judiciary Committees, at 25 (2018), https://www.copyright.gov/legislation/mma_conference_report.pdf (“Conf. Rep.”).

³⁸ FMC Reply at 1–2; *see also* Copyright Alliance Initial at 1 (discussing relationship between “existing general and niche markets”); A2IM & RIAA Reply at 9 (listing a variety of specialized storefronts and discussing period or niche recordings “not previously available through comprehensive streaming services like Spotify and Apple Music”); IMSLP.ORG Reply at 2 (classical music storefront).

their entire catalog available on mainstream streaming services.³⁹ The proposed rule attempts to account for the diversity of practices and leave room for these competing business models to innovate and flourish. But the proposed rule also takes into account smaller users. It tries to prioritize services with intuitive search capabilities and minimize resources where a subscription is required to access the search function; further, the categories to be searched—with the potential exception of interactive streaming services, which all commenters agree are statutorily required to be included in a search—are all available at no cost to the user.⁴⁰ As noted below, the Office has declined to include various suggestions that might be redundant or overly burdensome, and some criteria are included only as applicable to a particular genre of work. The proposed rule also does not require “consultation with an experienced music clearance professional,” although the Office does not discourage such consultation, which may prove helpful to a user planning a wide-scale or complex use case.⁴¹

In proposing the following search criteria, the Office agrees with various rights holders that the noncommercial use exception is not intended to displace the important role of licensed transactions to facilitate the use of Pre-1972 Sound Recordings.⁴² Indeed,

³⁹ FMC Reply at 3.

⁴⁰ See Public Knowledge Initial at 6 (“It would be inappropriate for the Copyright Office to require that a user search the catalog of a service where a subscription is required to access the search function.”). Public Knowledge would include Amazon Music Unlimited and Apple Music as proposed services to search, which are not free, and other services may require a paid subscription to enable more robust search features. See also A2IM & RIAA Reply at 5 (“[T]he cost of any necessary subscriptions is not very high, especially when considering the availability of free trials for premium services and free basic tiers for most services.”).

⁴¹ A2IM & RIAA Initial at 9.

⁴² See, e.g., *id.* at 1–2 (suggesting that in many cases, voluntary licensing may prove more efficient within a short timeframe than this exception); Copyright Alliance Initial at 2–3 (stating the noncommercial uses exception “should not be used to circumvent the normal licensing process or as a substitute for requesting permission from rights owners who can be contacted”); SoundExchange Initial at 2.

a main thrust of Title II is to “create royalties” for these works using the same rates and distribution system already applicable for post-72 works, particularly by music services that previously used pre-1972 works “while paying royalties for post-72 works.”⁴³ In this rulemaking, Copyright Alliance has asked the Office to require a user to directly notify a rights owner if that owner can be located.⁴⁴ While the Office agrees that, practically speaking, the noncommercial use exception may be unavailable for many works where the rights owner is readily identifiable since those works are more likely to be commercially exploited,⁴⁵ the statute does not require users to contact rights owners or determine that they cannot be located before relying on the section 1401(c) exception.⁴⁶ Instead, the purpose of the good faith, reasonable search is “to determine whether the sound recording is being commercially exploited by or under the authority of the rights owner.”⁴⁷ Although the Conference Report states that the noncommercial use exception is “provided *primarily* to enable use of older recordings where it may not be clear to a user how to contact the rights owner to ask for permission,”⁴⁸ use of the word “primarily” indicates that Congress contemplated situations where the rights owner may be known to the user, but the owner has ceased or otherwise refrained from commercially exploiting the sound recording. In any event, comments suggest that a large array of Pre-1972 Sound Recordings do not have an identifiable owner, in which cases a prospective user

⁴³ S. Rep. No. 115-339, at 17–18 (2018); *see* H.R. Rep. No. 115-651, at 15 (2018); 17 U.S.C. 1401(b), (d) (addressing payment of royalties pursuant to the rates and terms adopted under sections 112(e) and 114(f) or direct licensing).

⁴⁴ Copyright Alliance Initial at 2–3, 5.

⁴⁵ *See, e.g.*, A2IM & RIAA Initial at 1–2; SoundExchange Initial at 2; FMC Reply at 6 (“We largely agree with RIAA’s contextualization of 1401(c), as not oriented to cases where the current rights owner is known or ‘reasonably capable of discovery.’”); *but see* LCA Reply at 1.

⁴⁶ 17 U.S.C. 1401(c)(1)(A); *see also* EFF Initial Comments at 2.

⁴⁷ 17 U.S.C. 1401(c)(1)(A).

⁴⁸ Conf. Rep. at 25 (emphasis added).

making use of the section 1401(c) safe harbor and filing an NNU can expect to benefit from this additional exception.⁴⁹

Similarly, multiple commenters pointed out differences between section 1401(c)'s requirement to identify whether a work is being commercially exploited with prior proposals regarding orphan works, including a 2008 bill which provided a description of a “qualifying search, in good faith, to locate and identify the owner of the infringed copyright” before making use of an orphan work.⁵⁰ For these reasons, while the Office hopes that the MMA's noncommercial use provision may well prove to yield useful insights into the broader orphan works debate, the proposed rule is necessarily tailored to the *sui generis* noncommercial use exception for Pre-1972 Sound Recordings and was not crafted to specifically address that ongoing debate.⁵¹

Finally, while the proposed rule is intended to take into account the current music marketplace, Congress has provided regulatory flexibility so that the Copyright Office may periodically update its list of specific steps to take into account changes in the music

⁴⁹ Association for Recorded Sound Collections (“ARSC”) Reply at 2 (citing data suggesting that rights owner is unidentifiable for 16% of pre-1965 recordings, and up to 26% for certain categories like 1920-1929 or popular and rock recordings); *see also* Public Knowledge Initial at 3 (“The number of pre-1972 sound recordings that are still being commercially exploited are vastly outnumbered by those that have no commercial value or interest.”).

⁵⁰ *See* EFF Initial at 2; Public Knowledge Reply at 7; Shawn Bentley Orphan Works Act of 2008, S. 2913, 110th Cong. sec. 514(b)(1) (as passed by Senate, Sept. 26, 2008); *see also* U.S. Copyright Office, Orphan Works and Mass Digitization (2015), <https://www.copyright.gov/orphan/reports/orphan-works2015.pdf>; A2IM & RIAA Initial at 10 (agreeing with categorical approach adopted in the 2008 bill, but “find[ing] the steps outlined there to be too generic” for section 1401(c)); IMSLP.ORG Reply at 1 (maintaining that the “diligent effort” requirement in the 2008 bill is too general, and that having a “detailed list of steps required to satisfy the search requirement for services” would be more helpful). To the extent commenters suggested that the 2008 bill is helpful to highlight specific aspects of a proposed search step, it is addressed further below.

⁵¹ *See* Conf. Rep. at 15; S. Rep. No. 115-339, at 18 (2018) (noting *sui generis* nature of exception).

landscape, and the Office expects to exercise that authority as warranted by changes in the marketplace.⁵²

i. Required Sources to Search.

1. Searching the Copyright Office's Database of Pre-1972 Schedules

First, section 1401(c) requires that for a search to constitute a good faith, reasonable search, the search must include searching for the Pre-1972 Sound Recording in the Copyright Office's database of Pre-1972 Schedules.⁵³ The Office has issued an interim rule governing how rights owners may file Pre-1972 Schedules and how they are made publicly available through an online database.⁵⁴ For each sound recording, the Pre-1972 Schedule must include the rights owner's name, the sound recording title, and the featured artist, and rights owners may opt to include additional information, such as album title.⁵⁵

⁵² See Conf. Rep. at 25 (noting search must be based on "services available in the market at the time of the search"); A2IM & RIAA Initial at 7.

⁵³ 17 U.S.C. 1401(c)(1)(A)(i), (f)(5)(A). Public Knowledge asks the Office to "explore whether it possesses the authority to institute a limited renewal requirement, under which entries in [Pre-1972 Schedules] would be subject to a periodic renewal in the same vein as DMCA agent designations." Public Knowledge Reply at 17; see 37 C.F.R. 201.38(c)(4) (requiring DMCA agent designation to be updated every three years); see also 17 U.S.C. 512(c)(2)(B) (requiring the Register to "maintain a current directory" of agents). Section 1401 does not explicitly reference the need for periodic renewal of Pre-1972 Schedules, although it does apply different terms of protection to Pre-1972 Sound Recordings depending upon their year of first publication. 17 U.S.C. 1401(a)(2). The Office does not propose such a requirement at this time (and notes that substantive comments in its contemporaneous rulemaking regarding Pre-1972 Schedules did not raise this issue). The Office is open, however, to exploring the need and regulatory authority for such a renewal requirement for Pre-1972 Schedules (or NNUs) at a later date, perhaps in connection with periodic review of the search requirements promulgated under this rule.

⁵⁴ 83 FR 52150 (Oct. 16, 2018).

⁵⁵ 37 CFR 201.35(d). The Office expects to issue a final rule regarding the filing of Pre-1972 Schedules, which will ask rights owners to provide the International Standard Recording Code ("ISRC") (if known), and to optionally provide the version, alternate artist name(s), and Universal Product Code ("UPC"). This expansion of fields accommodates comments in that parallel proceeding, and should ease user concerns about disambiguating data. See A2IM, RIAA & SoundExchange Comments re Filing of Schedules by Rights Owners and Contact Information by

For this rulemaking, the proposed rule would require users to search for the title and featured artist(s) of the Pre-1972 Sound Recording. If the user knows any of the following attributes of the Pre-1972 Sound Recording, the search must also include searching: alternate artist name(s), alternate title(s), album title, and the International Standard Recording Code (“ISRC”). The user may also optionally search any other attributes known to the user of the sound recording, such as label, version, or Universal Product Code (“UPC”). The following fields in the Office’s database of Pre-1972 Schedules will be searchable: rights owner, sound recording title (which includes alternate titles), album, label, featured artist (which includes alternate artist name(s)), and ISRC. In response to comments, the Office is pleased to report that its database of Pre-1972 Schedules already allows for wildcard searching by using an asterisk to fill in partial words.⁵⁶ A user can export and download the search results based on those fields into an Excel spreadsheet to view (and search) additional data, such as version or UPC.

2. Searching with a major search engine

Second, the proposed rule asks the user to search for the Pre-1972 Sound Recording using at least one major search engine, namely: Google, Yahoo!, or Bing, to

Transmitting Entities Relating to Pre-1972 Sound Recordings at 7–8 (requesting addition of ISRC number, sound recording version, and alternate artist name fields); EFF Initial at 3 (discussing searches of the Office’s database of Pre-1972 Schedules).

⁵⁶ See, e.g., A2IM & RIAA Initial at 6; Copyright Alliance Initial at 4; EFF Initial at 3. For example, a search for “light*” in the title field currently returns, among other titles, “(In The) Cold Light Of Day,” “Harbor Lights,” “White Lightnin’,” and “White Lightning.” See *Schedules of Pre-1972 Sound Recordings*, U.S. Copyright Office, <https://copyright.gov/music-modernization/pre1972-soundrecordings/search-soundrecordings.html> (last visited Jan. 28, 2019). The Office has updated the search instructions on its database webpage so users are aware of this search capability. While the current technology does not permit “fuzzy” searching, that limitation is also noted on the webpage to guide user expectations.

determine whether the sound recording is being commercially exploited.⁵⁷ Users are widely accustomed to conducting internet searches, and such searching is free and may render searching on a streaming service or other service unnecessary. For example, a search on the phrase “rockin around the christmas tree” using Google—to locate the 1958 recording “Rockin’ Around the Christmas Tree” featuring artist Brenda Lee—shows, among other things, that the sound recording is available for streaming on Spotify, Google Play Music, Deezer, and Apple Music.⁵⁸ Similarly, a search on the combined phrases “rockin around the christmas tree” and “purchase” using Google shows that the same sound recording is available for sale as an .mp3 file download and on a compact disc through Amazon.com. The proposed rule, as well as the Office’s form or instructions, will make clear this search is to determine whether the Pre-1972 Sound Recording is being commercially exploited (*i.e.*, by being offered for sale in download form or as a new (not resale) physical product, or through a streaming service), and not simply whether the internet includes webpages discussing the recording, such as musicological, historical, or other commentary about the work.

3. Searching on a digital streaming service

Third, the proposed rule asks the user to search at least one of the following streaming services, each of which offers tens of millions of tracks⁵⁹: Amazon Music

⁵⁷ See A2IM & RIAA Initial at 5; Copyright Alliance Initial at 4; FMC Reply at 6 (each suggesting that major search engines should be searched).

⁵⁸ Google, <https://www.google.com/search?client=firefox-b-l-ab&q=%E2%80%9Crockin+around+the+christmas+tree%E2%80%9D> (last visited Jan. 28, 2019).

⁵⁹ A2IM & RIAA Initial at 5.

Unlimited,⁶⁰ Apple Music,⁶¹ Spotify,⁶² or TIDAL.⁶³ The Office proposes these streaming services because, among the commenters who proposed specific streaming services to search, there appears to be agreement on these services in particular.⁶⁴ In addition, these services currently offer some of the largest repertoires of tracks and “receive digital feeds from the major labels, large indie labels and significant distributors.”⁶⁵ The Office invites public comment on whether Google Play Music and/or Deezer should be included in the list of streaming services, as they also offer large repertoires of tracks but were not identified as possible sources from as many commenters.

A spectrum of commenters suggested that the rule should require a user to search multiple, but not all, such streaming services.⁶⁶ While it is clear that these services’ repertoires are not identical—including because some rights owners may engage in exclusive streaming arrangements⁶⁷—commenters also noted that searching multiple

⁶⁰ Amazon, *Amazon Music: What is Amazon Music Unlimited?*, <https://www.amazon.com/gp/help/customer/display.html?nodeId=202059460> (last visited Jan. 28, 2019) (stating Amazon Music Unlimited offers 50+ million tracks).

⁶¹ Apple, *Apple Music*, <https://www.apple.com/apple-music/> (last visited Jan. 28, 2019) (stating Apple Music offers 50+ million tracks).

⁶² Spotify, *Spotify Investors*, <https://investors.spotify.com/home/default.aspx> (last visited Jan. 28, 2019) (stating Spotify offers 40+ million tracks).

⁶³ TIDAL, *What is TIDAL*, <https://support.tidal.com/hc/en-us/articles/202992312-About-TIDAL> (last visited Jan. 28, 2019) (stating TIDAL offers 57+ million tracks).

⁶⁴ A2IM & RIAA Initial at 7 (identifying Amazon Music Unlimited, Apple Music, Spotify and TIDAL as possible streaming services to search); EFF initial at 4 (identifying Amazon Music, Apple Music, Spotify, and TIDAL as possible streaming services to search); Public Knowledge Initial at 5, App. (identifying Amazon Music Unlimited, Spotify, and Apple Music as possible streaming services to search).

⁶⁵ A2IM & RIAA Initial at 5.

⁶⁶ *Id.* at 7 (proposing users search on two services including, among others, Amazon Music Unlimited, Apple Music, Spotify and TIDAL); EFF Initial at 4 (contending that “[r]easonable to include some subset” of services including, among others, Amazon Music, Apple Music, Spotify, and TIDAL); Public Knowledge Initial at 5, App. (proposing search of “no more than one to two” of the following services: Amazon Music Unlimited, Spotify, or Apple Music).

⁶⁷ Recording Academy Reply at 4 (suggesting the rule should require searching of more than two services).

streaming services might be duplicative.⁶⁸ For example, Internet Archive, citing its own efforts to “automat[e] the process of searching for commercial availability at scale,” suggests that a good faith, reasonable search “should entail performing a few high quality searches on a small number of large services rather than performing a low quality search across a large number of services.”⁶⁹ The Office invites comment on whether users should be required to search a greater number of these services.

The Office agrees that requiring repetitive searches of all these streaming services would likely be redundant. Instead, as explained further below, because Pre-1972 Sound Recordings can also be expected to be commercially exploited outside of these services, the proposed rule would limit the number of streaming services to be searched, but add qualitatively different sources to search, such as major search engines, the SoundExchange ISRC lookup tool, and, for certain niche genres, other specific resources. By requiring searches on only one of these comprehensive streaming services, the proposed rule also minimizes the potential financial burden on prospective users. To be sure, A2IM and RIAA note that the cost of these subscription services are “not very high,” suggesting that it is not unreasonable to ask users “to take on a handful of short-term subscription payments in order to gain a royalty-free license to valuable sound recordings.”⁷⁰

IMSLP.ORG contends that users conducting a good faith, reasonable search under section 1401(c) should be able to search streaming services using “Application Programming Interfaces (APIs) officially supported by the relevant service,” as APIs

⁶⁸ A2IM & RIAA Initial at 7; Public Knowledge Initial at 2.

⁶⁹ Internet Archive Initial at 1.

⁷⁰ A2IM & RIAA Reply at 5–6 (noting similar requirement in 2008 Shawn Bentley Orphan Works Bill).

“considerably decrease the cost of performing such searches with no loss of accuracy.”⁷¹

The Office invites public comment on whether the proposed rule should address whether users should be able to use officially-supported APIs to search and locate a Pre-1972 Sound Recording on a streaming service.

4. Searching with the SoundExchange ISRC lookup tool

Fourth, the proposed rule asks the user to search for the Pre-1972 Sound Recording using the free online SoundExchange ISRC lookup tool (located at <https://isrc.soundexchange.com/#!/search>) to search SoundExchange’s database, which contains information for more than 27 million sound recordings, including Pre-1972 Sound Recordings.⁷² An overwhelming number of stakeholders representing rights owners recommended inclusion of the SoundExchange ISRC lookup tool as an important category of search.⁷³ For its part, SoundExchange characterizes its database as “quite possibly the most authoritative and comprehensive database of sound recordings that have otherwise been commercially exploited.”⁷⁴ On the other hand, Public Knowledge objects to including this lookup tool because it is not itself a “service[] offering a comprehensive set of sound recordings for sale or streaming.”⁷⁵

⁷¹ IMSLP.ORG Reply 2.

⁷² SoundExchange Initial at 2–3.

⁷³ See A2IM & RIAA Initial at 5 (rights owners provide metadata to SoundExchange “for royalty collection, which is a form of commercial exploitation”); Copyright Alliance Initial at 5 (“SoundExchange’s ISRC search tool should be searched, as it provides a vast library of information concerning sound recordings that are submitted by rights owners and their authorized representatives to SoundExchange for the purpose of collecting royalties, which is a form of commercial exploitation”); SoundExchange Initial at 2–14; FMC Reply at 6 (stating that the SoundExchange ISRC lookup tool is “eminently useful” and that inclusion of a sound recording in this database “is an unambiguous indicator that a recording is being commercially exploited”); Recording Academy Reply at 3 (“SoundExchange’s ISRC Search tool is indispensable to a good faith, reasonable search.”).

⁷⁴ SoundExchange Initial at 2.

⁷⁵ Public Knowledge Reply at 10 (citing 17 U.S.C. 1401(c)(1)(A)(ii)).

Because the ISRC lookup tool allows users to freely and easily search a deep trove of sound recording information that rights owners themselves have submitted in connection with commercializing those recordings, including on multiple streaming services, the proposed rule tentatively concludes it is desirable and appropriate to include this tool as a step in a sufficient good faith, reasonable search. A few considerations buttress this conclusion. First, rights owners register and provide these data regarding their sound recordings so they can be paid for their use under the statutory and direct licenses administered by SoundExchange, including the compulsory licenses applicable for Internet radio, satellite radio, cable TV music services, streaming into business establishments, and other services.⁷⁶ As a result, the database provides indicia of exploitation on a wide expanse of music services that the Office does not otherwise propose searching before a user may qualify for the safe harbor under section 1401(c) (e.g., Pandora, SiriusXM, iHeartRadio, MusicChoice, and over 3,100 other non-interactive digital streaming services).⁷⁷ While not disputing that these types of non-interactive services are exploiting Pre-1972 Sound Recordings, Public Knowledge and others propose excluding non-interactive services “because they are not usefully searchable for specific tracks.”⁷⁸ But unlike other parts of the copyright law, the reference

⁷⁶ SoundExchange Initial at 2–3 (“[R]ights owners and their representatives made a conscious choice to register with SoundExchange and submit their repertoire metadata to allow them to be paid for uses of their works under the statutory licenses and direct licenses administered by SoundExchange.”).

⁷⁷ See SoundExchange, *Who Pays SoundExchange: Q3 2018*, <https://www.soundexchange.com/wp-content/uploads/2016/09/2018-Jan-Sept-Licensee-List.pdf>.

⁷⁸ Public Knowledge Initial at 6; see also EFF Initial at 4 (proposing to exclude “services like Pandora and Sirius XM” because they “do not offer granular searches for particular recordings” but supporting a potential search requirement of music distribution services that supply works to such services); cf. Recording Academy Reply at 3 (“Excluding entirely non-interactive services

to “services” in section 1401(c) does not distinguish between non-interactive and “interactive services.”⁷⁹ Given the acknowledged commercial exploitation on non-interactive services, it seems reasonable for a good faith search to cover this broader array of services. Second, this database appears to offer user friendly and granular results available for these recordings. Using the lookup tool is free, without requiring the user to establish an account, take a subscription, or convey any personal information.⁸⁰ It also apparently receives high marks regarding search confidence and ease, employing fuzzy matching and wildcard searching that a broad spectrum of commenters concur is helpful in gauging the accuracy of results.⁸¹ Third, the information in the ISRC database is populated and verified by rights owners themselves, allaying concerns that inaccurate information may lead prospective users astray.⁸² The uneven quality of publicly accessible music repertoire data is well-documented and indeed, an animating issue that the Music Modernization Act seeks to address in the context of the section 115 license.⁸³

that utilize the Section 114 statutory license would immediately render a search to determine if a track is being commercially exploited both unreasonable and in bad faith.”).

⁷⁹ Compare 17 U.S.C. 1401(c)(1), (3) with 17 U.S.C. 114(d)(2)–(3), (e)(2) (j)(6)–(7) (various provisions distinguishing between interactive and non-interactive services).

⁸⁰ See Public Knowledge Initial at 6 (advocating “free-to-search”); EFF Initial at 4 (sources should be “searchable without a paid subscription, and without requiring users to disclose personal information”); Wikimedia Foundation at 5 (same).

⁸¹ See, e.g., Wikimedia Foundation at 5 (discussing potential “deficiencies in the searchability of the specified databases,” such as errors or “the presence of absence of ‘the’ in names or titles”); EFF Initial at 3 (search results are limited by characteristics of the software as well as search terms used); Internet Archive Initial (stressing importance of “high quality” searches); A2IM & RIAA at 2 (importance of fuzzy matching and wildcard searching); Copyright Alliance Initial at 4 (same regarding Office’s database).

⁸² See, e.g., Internet Archive Initial at 2 (expressing concern that Spotify database includes “unlicensed” recordings); Public Knowledge Reply at 11 (objecting to YouTube being included in search steps as unlicensed content is not “by or under the authority of the rights holder”; expressing concerns about resale or imported physical media).

⁸³ See U.S. Copyright Office, Copyright and the Music Marketplace 184 (2015), <https://www.copyright.gov/policy/musiclicensingstudy/copyright-and-the-music-marketplace.pdf>; H.R. Rep. No. 115-651 at 8 (“Music metadata has more often been seen as a competitive

As SoundExchange attests, “even when SoundExchange learns from a service of a putative recording not represented in its repertoire database, SoundExchange will not reflect the recording in its repertoire database unless identifying information for the recording is provided by the rights owner or authorized representative of the rights owner.”⁸⁴

The Office does not read section 1401(c) so narrowly as to preclude searching resources—such as the SoundExchange ISRC lookup tool or major search engines—that are used “*to determine whether*” a Pre-1972 Sound Recording is being commercially exploited on services offering a comprehensive set of sound recordings for sale or streaming.⁸⁵ Such cross-platform tools can quickly reveal information relevant to whether a recording is being used on a variety of services that are unequivocally involved in commercially exploiting the sound recordings, but of which the Office does not propose searching for purposes of this safe harbor, as noted further below. To exclude reliance upon these sources would hamper the Office’s ability to craft a smaller list of “specific, reasonable steps” that a user may take before filing a NNU.⁸⁶ Requiring a prospective user to search the ISRC lookup tool is thus expected to serve as a reasonable proxy for searches on a wide array of services that offer a comprehensive set of sound recordings for sale or streaming, and specifically, to address stakeholder concerns (from both the

advantage for the party that controls the database, rather than as a resource for building an industry on”; noting that the database required by the legislation will include a variety of sound recording information); *see also* SoundExchange Initial at 43 (“Many digital music services operating under the statutory licenses have (or at least report to SoundExchange) very low quality data identifying the recordings they use.”).

⁸⁴ SoundExchange Initial at 4.

⁸⁵ 17 U.S.C. 1401(c)(1)(A) (emphasis added).

⁸⁶ *Cf.* Public Knowledge Initial at 2, 6 (suggesting search requirements should be “proportional”).

prospective user and rights owner perspectives) that it is otherwise difficult to determine exploitation by non-interactive services that offer limited user search capability.⁸⁷

5. Searching sellers of physical product

Fifth, the proposed rule asks the user to search for the Pre-1972 Sound Recording on at least one major seller of physical product, namely Amazon.com, and if the user reasonably believes that the sound recording is of a niche genre such as classical music (including opera) or jazz, one smaller online music store offering recordings in that niche whose repertoires are searchable online, namely: ArkivJazz, ArkivMusic (classical), Classical Archives, or Presto (classical). Users of works in other genres are encouraged but not required to search Acoustic Sounds or Smithsonian Folkways Recordings (*e.g.*, international or “world” music, zydeco, folk, spoken word).⁸⁸ The Office invites public comment on whether, in addition to classical music and jazz, there are specific niche genres of Pre-1972 Sound Recordings that similarly should require the user to search another online music service offering a comprehensive set of recordings in that niche—and if so, to identify the specific sources to be searched.

⁸⁷ See 17 U.S.C. 1401(c)(1)(A); (3). *Compare* Copyright Alliance Reply at 2–3; FMC Reply at 4; and Recording Academy Reply at 3 (expressing concerns related to rights owner interests) *with* EFF Initial at 4 *and* Public Knowledge Initial at 2 (expressing concerns related to user perspectives).

⁸⁸ The proposed rule thus collapses steps 8 and 9 as proposed by A2IM & RIAA, that is, searches of retailers of physical product and niche services. *Compare* A2IM & RIAA Initial at 6. The record and the Office’s observations suggest that the universe of niche digital-only sites is small, focused on classical music, and likely to overlap with searches of retailers of physical product.

The Office agrees that it is appropriate to limit safe harbor requirements to search for physical products to Internet searches,⁸⁹ but finds it important that a good faith, reasonable search be calculated to include “services offering a comprehensive set of sound recordings *for sale*,”⁹⁰ as some works may be less available on streaming services, but are nonetheless being commercialized in physical formats, including reissues.⁹¹ Although Public Knowledge and IMSLP.ORG express concern that sales of physical copies include second-hand sales, as opposed to commercial exploitation by the copyright owner,⁹² physical retailers typically indicate whether the products are new or used, and others note the robust market for newly reissued albums.⁹³ For example, a search for “Faith and Grace” by The Staple Singers on Amazon.com allows users to purchase both new and used compact discs with that sound recording.⁹⁴

6. Searches for ethnographic Pre-1972 Sound Recordings

At the reply comment stage, concerns regarding the noncommercial use of ethnographic Pre-1972 Sound Recordings were raised by the National Congress of

⁸⁹ EFF Initial at 4 (“The Office should not require that potential users search for commercialization of physical copies of recordings unless records of such commercialization are searchable on the Internet or in the Office’s pre-1972 schedules.”).

⁹⁰ 17 U.S.C. 1401(c)(1)(ii) (emphasis added).

⁹¹ See, e.g., FMC Reply at 3 (providing example of recordings by The Staple Singers which are readily available as a box set via Amazon.com or Discogs.com, and easily located by a simple search engine search, but which are unavailable on Spotify or Apple Music).

⁹² Public Knowledge Initial at 7; Public Knowledge Reply at 11; IMSLP.ORG Reply at 1.

⁹³ See FMC Reply at 6. FMC contends that Public Knowledge “overstates the difficulty of discerning whether physical media is made available by authorization of the rightsholder—the risk of a false positive is small when every physical retailer classifies its products as new or used.” *Id.* at 4. Indeed, although Public Knowledge raises the issue of items being offered for resale “new” a/k/a in original shrink wrap packaging, its own example suggests that “further inspection” can typically clarify whether an item is being offered for first sale, or resale. Public Knowledge Reply at 12.

⁹⁴ *Faith and Grace: A Family Journey 1953-1976*, Amazon (last visited Jan. 28, 2019), https://www.amazon.com/gp/product/B015FWTAOO?pf_rd_p=c2945051-950f-485c-b4df-15aac5223b10&pf_rd_r=QFZRHA19C97VBPY81EGB; FMC Reply at 3 (noting availability of “Faith and Grace” on a compact disc set, but not on Spotify or Apple Music).

American Indians (“NCAI”), the oldest and largest national organization made up of Alaska Native and American Indian tribal government, and Professors Trevor Reed, Jane Anderson, and Robin Gray, who have worked on legal and cultural issues surrounding pre-1972 ethnographic sound recordings. NCAI asserts that “[t]he lack of complete and accurate information typically available on copyright interests in ethnographic sound recordings, and the cultural sensitivity of the contents of many ethnographic sound recording collections, merits consideration of special opt-out rules carefully tailored to the specific needs of Native American communities.”⁹⁵ As NCAI explains further:

Often such recordings are the result of anthropological or ethnographical gatherings of sound recordings, frequently capturing ceremonial or otherwise culturally significant songs. Further, due to the circumstances of how these recordings were conducted – often without any documentation of the free and prior informed consent of the tribal practitioners/performers – tribes today are unaware of much of the content that they potentially hold valid copyright claims over.⁹⁶

Similarly, Professors Reed, Anderson, and Gray explain that “scholars have extensively documented the inequalities and ethical dilemmas surrounding early ethnographic field recording,” claiming that “ownership interests in pre-1972 ethnographic sound recordings are presumed to have vested in and remained with the performers who recorded them under the common-law rule,” but that unrelated holding institutions (*e.g.*, libraries, archives, museums, and universities) typically possess the master recordings.⁹⁷ Those professors suggest that regulations governing the noncommercial use exception under section 1401(c) “must be carefully tailored to the informational disadvantages Native American tribes and tribal members face as they

⁹⁵ NCAI Reply at 1.

⁹⁶ *Id.*

⁹⁷ Reed, Anderson & Gray Reply at 2.

attempt to locate and protect their rights to ethnographic sound recordings.”⁹⁸ Specifically, they maintain that for pre-1972 Native American ethnographic recordings, “a user should not qualify for the [section 1401(c)] safe harbor unless the relevant Native American tribe or tribes has certified the identity of the sound recording, its owner(s), and its current commercial uses.”⁹⁹

The Copyright Office is sensitive to the need to ensure that regulations governing the noncommercial use of Pre-1972 Sound Recordings do not adversely impact Alaska Native and American Indian tribes or communities. The Office has previously noted that ethnographic field recordings “are an enormous source of cultural and historical information, and come with their own unique copyright issues,”¹⁰⁰ and that “librarians and archivists who deal with ethnographic materials must abide by the cultural and religious norms of those whose voices and stories are on the recordings.”¹⁰¹ The Office appreciates that the public ownership record for these recordings may be less developed and/or indexed into major search engines, and that as a result, searches that are otherwise reasonable for a prospective user may fail to identify that a specific ethnographic recording is being commercially exploited by the rights owner. But the Office must also be careful not to exceed its regulatory authority, by, for example, imposing a requirement

⁹⁸ *Id.* at 3.

⁹⁹ *Id.* at 4.

¹⁰⁰ U.S. Copyright Office, Federal Copyright Protection For Pre-1972 Sound Recordings 52 (2011), <https://www.copyright.gov/docs/sound/pre-72-report.pdf> (“Pre-1972 Sound Recordings Report”).

¹⁰¹ *Id.* at 61 (citing Rob Bamberger and Sam Brylawski, Nat’l Recording Preservation Board of the Library of Congress, *The State of Recorded Sound Preservation in the United States: A National Legacy at Risk in the Digital Age* 19 (2010)).

that the user obtain certification of the identity of the sound recording and its owner before making use of the safe harbor.¹⁰²

Accordingly, for ethnographic Pre-1972 Sound Recordings of Alaska Native or American Indian tribes or communities, if the user does not locate the relevant sound recording in the Copyright Office’s database of Pre-1972 Schedules or other search categories, the proposed rule asks the user to contact the Alaska Native or Native American tribe and, if known to the user, the relevant holding institution to aid in determining whether the sound recording is being commercially exploited.¹⁰³ Specifically, the rule proposes that the user make contact by using contact information known to the user if applicable, and also by using the contact information provided in NCAI’s tribal directory.¹⁰⁴ If no information is listed or the tribe is unknown to the user, the user should contact NCAI itself. The Office believes that this search step is a reasonable burden to ask prospective users of such expressions of cultural heritage in light of the complicated history of some of these sound recordings. The Office also expects that the notification requirement will prove useful to rights owners who wish to exercise discretion to opt out of the noncommercial use by filing notice in the Copyright Office.¹⁰⁵

The Copyright Office appreciates that these issues are nuanced and is committed to addressing them in a sensitive and thoughtful manner. The Office acknowledges that

¹⁰² Compare Reed, Anderson & Gray Reply at 4.

¹⁰³ See *id.* at 2 (suggesting that the marketplace lacks “inaccurate and unreliable information about these sound recordings,” necessitating tribal consultation). For example, the professors’ comment suggests that making contact may be valuable to provide title, artist, or other information relevant to a particular recording.

¹⁰⁴ See *Tribal Directory*, Nat’l Cong. of Am. Indians (last visited Jan. 28, 2019), <http://www.ncai.org/tribal-directory> (providing searchable directory by tribe name, area, and keyword).

¹⁰⁵ See 17 U.S.C. 1401(c)(1)(C).

these comments were received in the reply comment stage, without opportunity for further comment. Because the Office must timely promulgate a rule for the safe harbor to be available to prospective users of all types of Pre-1972 Sound Recordings,¹⁰⁶ interested parties are encouraged to submit written comments or contact the Office for a meeting to discuss this provisional aspect of the proposed rule.

ii. Sources Not Required to be Searched.

The proposed rule is intended to be accurate and comprehensive, while minimizing redundancy. In proposing a list of “specific, reasonable” steps, the Office declines to add some additional search steps or services proposed by some commenters.

Among suggestions received, the rule does not propose to include:

- Additional comprehensive streaming services beyond the one the user elects to search from the proposed rule’s list of services
- Terrestrial or internet radio services, including non-interactive services subject to the section 114 license¹⁰⁷
- The to-be-created Mechanical Licensing Collective database¹⁰⁸
- Dogstar Radio, which offers searchable playlists from Sirius XM
- Online databases of U.S. performing rights organizations
- Other comprehensive databases offered by private actors (*e.g.*, Songfile, Rumblefish, Songdex, Cuetrak, Crunch Digital)
- IMDB.com
- Video streaming services

¹⁰⁶ *Id.* at 1401(c)(3).

¹⁰⁷ As noted above, this conclusion is based, in part, on the proposal to include the SoundExchange ISRC lookup tool in the proposed rule.

¹⁰⁸ Although the Office is open to revisiting the relevance of the MLC database once it is up and running, it is disinclined to ask rights owners to provide “the hashes, with APIs, of all pre-72 sound recordings indexed” into the database. Music Library Association Initial at 1; *see also* A2IM & RIAA Initial at 5 (suggesting database should be searched *sans* hashes). Other commenters have explained in more detail the difficulty with this request, and overall the Office agrees that the Music Library Association’s proposal is opaque and beyond the scope of this rulemaking. *See* A2IM & RIAA Reply at 4; Copyright Alliance Reply at 2; FMC Reply at 2.

- The SXWorks NOI Tools
- Music distribution services (*e.g.*, CDBaby, Tunecore)
- Predominantly foreign music services¹⁰⁹
- SoundCloud or Bandcamp
- Niche streaming services (*e.g.*, Idagio, Primephonic)

Notably, the proposed rule does not ask the user to search services based on the commercial exploitation of user-generated content, such as YouTube. Commenters IMSLP.ORG and Public Knowledge maintain that a search should not include services permitting user-uploaded content because such services include unauthorized uses of Pre-1972 Sound Recordings, which do not constitute commercial exploitation “by or under the authority of the rights owner” as required by section 1401(c)(1)(A).¹¹⁰ By contrast, Recording Academy contends that Congress contemplated searching on services with user-uploaded streaming platforms.¹¹¹ The Office agrees that a good faith, reasonable search should be targeted at locating authorized instances of commercial exploitation, and the presumptive difficulty for online service providers to predetermine whether content is authorized by a rights owner is inherent to the section 512 safe harbor, which limits

¹⁰⁹ See *Find Music Services*, Pro Music, <https://pro-music.org/legal-music-services.php> (last visited Jan. 28, 2019); see also A2IM & RIAA Initial at 6; IFPI Initial at 1–2; Public Knowledge Reply at 2 (all discussing same).

¹¹⁰ IMSLP.ORG Reply at 2 (“services permitting user-uploaded content without any mandatory service-side verification of copyright ownership” such as YouTube “should be categorically excluded” from noncommercial use searches under section 1401(c)); Public Knowledge Reply at 11 (maintaining that because websites like YouTube display a combination of licensed and unlicensed media, a sound recording’s “availability on that platform may not be reliable evidence of the recording being commercially exploited ‘by or under the authority of the rights owner’ as required by § 1401(c)(1)(A)”).

¹¹¹ Recording Academy Reply at 4 & n.5 (citing Conf. Rep. at 25) (“it is important that a user seeking to rely on subsection (c) make a robust search, including user-generated services and other services available in the market at the time of the search”).

liability for such services displaying user-uploaded infringing content.¹¹² Because a user conducting a section 1401(c) search on a service permitting user-uploaded content may have no way of knowing if the use of a Pre-1972 Sound Recording is “by or under the authority of the rights owner,”¹¹³ the proposed rule does not require the user to search on a service permitting user-uploaded content.

As discussed above, the proposed rule aims to strike a balance between the reasonableness and comprehensivity of the search for this particular subset of works, and can be updated as market conditions warrant. The Office believes that the proposed steps, including the requirement to search major search engines, which may index some of the information contained in the above services, will result in identifying a vast amount of the Pre-1972 Sound Recordings being commercially exploited at the time searches are conducted. If a rights owner is concerned about recordings being overlooked, the Office encourages the filing of a Pre-1972 Schedule and/or monitoring the filing of NNUs for the opportunity to opt out of a particular requested noncommercial use.

Likewise, in commenting on the proposed rule, it would be helpful for user-oriented groups to acknowledge that a list of specific steps should be reasonably calculated to identify recordings being commercially exploited, even where this entails added searching steps of the prospective user.¹¹⁴ The Office does not believe the

¹¹² See 17 U.S.C. 512. To pick but one example, a YouTube search of ragtime and early jazz pianist “Jelly Roll Morton” yielded a long scroll of hits featuring his sound recordings, and spot checks did not indicate whether any were authorized, without further refining the search criteria to incorporate record labels or album titles readily identifiable from searching the SoundExchange ISRC lookup tool or Amazon.com. YouTube, https://www.youtube.com/results?search_query=%E2%80%9CJelly+Roll+Morton%E2%80%9D + (last visited Jan. 29, 2019).

¹¹³ *Id.* at 1401(c)(1)(A).

¹¹⁴ See *id.* at 1401(c)(1), (3).

proposed rule to be unwieldy from the user perspective. Moreover, while the statute is very clear that following this closed-list of steps is sufficient to qualify for the safe harbor,¹¹⁵ the proposed rule does not intend to discourage users from taking additional steps that they believe may be fruitful in identifying commercial exploitation of a given Pre-1972 Sound Recording, or in locating the rights owner to negotiate a permissive use, including by searching these additional sources identified by commenters.

iii. Search Terms and Strategy.

1. General rule

In general, the proposed rule asks a user to search on the title and featured artist(s) of the Pre-1972 Sound Recording in the various search categories. If the user knows any of the following attributes of the Pre-1972 Sound Recording, and the source has the capability for the user to search any of the following attributes, the user must also search: alternate artist name(s), alternate title(s), album title, and the International Standard Recording Code (“ISRC”). The user may also optionally search any other attributes known to the user of the sound recording, such as label, version, or Universal Product Code (“UPC”). Narrowing a search by these attributes may inform a user’s good faith, reasonable determination whether or not a Pre-1972 Sound Recording is being commercially exploited.¹¹⁶ Because “year” may refer to year of a record’s release or re-release, rather than year of recording, the proposed rule does not require searching this attribute.

2. Classical music sound recordings

¹¹⁵ *Id.* at 1401(c)(4)(B).

¹¹⁶ *See* EFF Initial at 3.

Because classical music sound recordings require more information to sufficiently identify the sound recording, the proposed rule requires the user to search on additional attributes for those types of sound recordings. For example, the same conductor could have conducted Beethoven’s Symphony No. 9 on multiple occasions, with the same or different orchestras. Even to the trained ear (or database),¹¹⁷ distinguishing between sound recordings of those various performances may well be impossible without knowing the musical work’s composer and opus, the conductor, the performers (*e.g.*, orchestra), and year of performance. Indeed, as with Beethoven’s Symphony No. 9, the composer and opus effectively function as the work’s title; the closest simile to a “featured artist” may be the conductor, featured performers, or ensemble, depending upon the work.¹¹⁸ Accordingly, the proposed rule requires the user to search on these additional attributes when trying to determine whether a Pre-1972 Sound Recording of classical music is being commercially exploited.

The Office invites public comment on whether other, specific genres of sound recordings (*e.g.*, jazz) similarly can be reasonably expected to require searching additional terms to identify the sound recording sufficiently—and if so, what those additional attributes should be.

¹¹⁷ See, *e.g.*, *What Type of Music Can Shazam Identify*, Shazam, <https://support.shazam.com/hc/en-us/articles/204462958-What-type-of-music-can-Shazam-identify-> (last visited Jan. 28, 2019) (“Classical tracks can be recorded many times over by various artists, so it can sometimes be tricky for Shazam to tell the different versions apart.”).

¹¹⁸ See, *e.g.*, Anastasia Tsioulcas, *Why Can’t Streaming Services Get Classical Music Right?*, NPR The Record (June 4, 2015, 10:50 AM), <https://www.npr.org/sections/therecord/2015/06/04/411963624/why-cant-streaming-services-get-classical-music-right> (describing the metadata conundrum in classical music and difficulty searching streaming services); ArkivMusic, <http://www.arkivmusic.com/classical/main.jsp> (last visited Jan. 28, 2019) (listing search categories of composers, conductors, performers, ensembles, labels, operas, and medium of physical product).

3. *Remastered Pre-1972 Sound Recordings*

As noted below, prospective users must certify that they have conducted a good faith, reasonable search when filing NNUs. While the Office will not examine for a NNU's legal validity, it suggests that should the user find a "remastered" version of a Pre-1972 Sound Recording through searching in any of the categories listed in the proposed rule, such a finding likely evidences commercial exploitation of the Pre-1972 Sound Recording. The Office has previously noted that "remastering" a sound recording may consist of mechanical contributions or contributions that are too minimal to be copyrightable.¹¹⁹ For example, it would be prudent for a user to consider a 1948 track that was remastered and reissued in 2015 to qualify as a Pre-1972 Sound Recording.

iv. Other Considerations.

1. Searches for foreign Pre-1972 Sound Recordings

Stakeholders question whether the section 1401(c) exception applies to foreign Pre-1972 Sound Recordings (*i.e.*, Pre-1972 Sound Recordings originating outside the United States). EFF contends that the section 1401(c) exception does apply, "as nothing in the extensive and detailed language of the MMA authorizes such a carve-out."¹²⁰ A2IM and RIAA appear to agree, contending that a search under section 1401(c) should include "leading digital services in relevant foreign countries including the country of origin or countries where the work is most popular, to the extent those services are accessible from the U.S."¹²¹ By contrast, IFPI maintains that the Office should clarify that the section 1401(c) exception applies only to foreign sound recordings that have

¹¹⁹ U.S. Copyright Office, *Compendium of U.S. Copyright Office Practices* sec. 803.9(F)(3) (3d ed. 2017) ("*Compendium (Third)*").

¹²⁰ EFF Reply at 5.

¹²¹ A2IM & RIAA Initial at 6.

“previously been exploited commercially in the US, thereby establishing a nexus between the US and the rightholder(s) in question.”¹²²

Prior to the enactment of the MMA, certain foreign Pre-1972 Sound Recordings were already granted copyright protection in the United States.¹²³ In 1994, the Uruguay Round Agreements Act (“URAA”) amended section 104A to automatically restore U.S. copyright protection to certain foreign works that had been in the public domain in the United States due to lack of copyright protection for Pre-1972 Sound Recordings more generally.¹²⁴ While copyright is restored automatically in eligible works, the owner of a restored work must notify reliance parties if they plan to enforce those rights, including constructively by filing a notice of intent to enforce with the Copyright Office.¹²⁵

The MMA revised section 301(c), which now states that “[n]otwithstanding the provisions of section 303, and in accordance with [section 1401], no sound recording fixed before February 15, 1972, shall be subject to copyright under [title 17].”¹²⁶ But section 1401 and the legislative history do not reference foreign recordings specifically, or refer to or revise section 104A, and there is no evidence of congressional intent to extinguish copyright protection granted to foreign Pre-1972 Sound Recordings under section 104A.¹²⁷

¹²² IFIP Initial at 2.

¹²³ 17 U.S.C. 104A(a), (h)(6)(C).

¹²⁴ *Id.* at 104A(a), (h)(6)(C)(ii) (referencing “sound recordings fixed before February 15, 1972”).

¹²⁵ See U.S. Copyright Office, *Circular 38B: Copyright Restoration Under the URAA*, <https://www.copyright.gov/circs/circ38b.pdf>.

¹²⁶ 17 U.S.C. 301(c).

¹²⁷ In comparison, to minimize concerns regarding any “takings” of property under the Fifth Amendment under section 104A, Congress included provisions to protect the interests of parties who had relied on the loss of copyright protection for such works before enactment of the URAA (*i.e.*, “reliance parties”). See *id.* at 104A(d)(2), (h)(4).

Section 1401 provides *sui generis* protection running parallel to any copyright protection afforded to foreign Pre-1972 Sound Recordings under section 104A.¹²⁸ While section 1401(c) operates as a limitation on the protection available under that new chapter, it does not explicitly limit title 17 copyright protection for certain foreign restored works (*i.e.*, copyright protection under section 104A). Whether the noncommercial use exception under section 1401(c) can immunize content actionable under title 17 for restored works that are foreign Pre-1972 Sound Recordings may ultimately be a matter for the courts to resolve. Because protection and enforcement for foreign restored rights is fact-intensive—implicating the specific source country, date and location of publication, duration of term in both the United States and the source country, and compliance with formalities—prospective users of foreign Pre-1972 Sound Recordings should proceed cautiously before relying on the section 1401(c) exception.

2. Reliance on third-party searches

Stakeholders disagree as to whether a user may rely on searches conducted by third parties to meet the good faith, reasonable search requirement under section 1401(c). ARSC and EFF contend that users should be able to rely on previous searches conducted for a Pre-1972 Sound Recording when filing an NNU to avoid “duplicated effort”¹²⁹ and “nothing but make-work.”¹³⁰ By contrast, Copyright Alliance, A2IM, RIAA, and FMC

¹²⁸ See Conf. Rep. at 15 (discussing *sui generis* of chapter 14); see also IFPI Initial at 1–2 (discussing foreign Pre-1972 Sound Recordings).

¹²⁹ ARSC Reply at 4.

¹³⁰ EFF Reply at 4.

maintain that users relying on searches of other users could create blanket exceptions of noncommercial use.¹³¹

The Office agrees that reliance on a third-party search, unless the third party conducted the search as the user's agent, is not reasonable. The third party may have conducted an inadequate search and incorrectly concluded that a Pre-1972 Sound Recording is not being commercially exploited. Or, as noted by A2IM and RIAA, a Pre-1972 Sound Recording may become subject to commercial exploitation after a third party has conducted a search, but before another user desires to use the same sound recording for a noncommercial use under section 1401(c).¹³² As noted below, a user will be required to certify that she conducted a good faith, reasonable search when submitting an NNU, and a user cannot certify the actions of an unrelated third party. Accordingly, the proposed rule does not permit a user to rely on a search conducted by a third party, unless the third party conducted the search as the user's agent.

3. Timing of completing a search before filing an NNU

To ensure that search results are not stale, the proposed rule states that the user (or the user's agent) must conduct a search under section 1401(c) within 90 days before submitting an NNU with the Office.¹³³ The Music Library Association asserts that if a

¹³¹ Copyright Alliance Initial at 3 (“[A] notice of noncommercial use for a particular pre-72 sound recording should not create a blanket exception for all future noncommercial uses of that sound recording.”); A2IM & RIAA Reply at 9 (“Congress never envisioned that the index of NNUs would operate as a de facto database of recordings available for noncommercial uses pursuant to the new safe harbor.”); FMC Reply at 2 (“[W]e see no justification for the suggestion that ‘if a search has been done within a certain time frame, it does not have to be repeated’ . . .” (quoting Music Library Association Initial at 2)).

¹³² A2IM & RIAA Reply at 9.

¹³³ See A2IM & RIAA Initial at 21 (contending search must be conducted within 90 days of filing an NNU to be reasonable); Copyright Alliance Initial at 6 (same). Public Knowledge suggests that an even earlier period of 30 days would be reasonable. Public Knowledge Initial at App.

search has been conducted within a certain timeframe, the search should not have to be repeated.¹³⁴ The Office agrees, and believes that 90 days is a reasonable timeframe for a search to remain fresh.¹³⁵ Accordingly, a user may rely on a search for a Pre-1972 Sound Recording that she (or her agent) has conducted for 90 days before submitting an NNU proposing a noncommercial use of the same sound recording.

B. Notices of Noncommercial Use (NNUs)

i. Form and Content of NNUs.

1. Overview of Proposed Rule

Commenters offer various proposals on information to be required in NNUs, particularly regarding the level of detail required to describe the good faith, reasonable search and the proposed noncommercial use. Regarding the search, Copyright Alliance, A2IM, and RIAA maintain that the user should be required to describe and certify the steps taken for a search of the Pre-1972 Sound Recording in the NNU,¹³⁶ whereas the Music Library Association contends that a user should just have to state that she conducted a good faith search and found no commercial exploitation.¹³⁷ In addition, stakeholders disagree on whether the user should be required to document her search, such as by submitting screen shots from searched websites.¹³⁸ Copyright Alliance, A2IM,

¹³⁴ Music Library Association Initial at 2.

¹³⁵ Ninety days is also the timeframe that a rights owner filing a Pre-1972 Schedule must wait before bringing an action for statutory damages or attorneys' fees, 17 U.S.C. 1401(f)(5)(A)(i)(II), and the timeframe a rights owner has to object to a proposed noncommercial use, *id.* at 1401(c)(1)(C).

¹³⁶ A2IM & RIAA Initial at 21 (contending that user should provide "a certified step-by-step account of all sources searched and the precise search terms used"); Copyright Alliance Initial at 6.

¹³⁷ Music Library Association Initial at 1.

¹³⁸ *Compare* Copyright Alliance Initial at 6 (user should be required to document the search); IMSLP.ORG Reply at 1 (same); A2IM & RIAA Initial at 21 (same); *with* Public Knowledge

and RIAA also suggest that users should be required to certify their filings under penalty of perjury.¹³⁹

Regarding the proposed use of a Pre-1972 Sound Recording, Copyright Alliance, A2IM, and RIAA state that the user must sufficiently identify the Pre-1972 Sound Recording she wishes to use and the nature of the proposed use.¹⁴⁰ A2IM and RIAA note that without this information, “it is impossible for rights owners to exercise their opt-out right in any meaningful way.”¹⁴¹ By contrast, EFF and Public Knowledge assert that the user should not have to provide a detailed description of the proposed use.¹⁴² EFF and Public Knowledge also suggest that the Office should allow users to combine multiple notices of noncommercial use into a single filing, as well as opt-out notices directed to the same potential user.¹⁴³

After duly considering all of the public comments, the rule proposes to include a mix of required and optional information to establish a baseline of information that will

Reply at 14 (section 1401(c) does not require documentation of the search for the safe harbor to apply); EFF Reply at 4 (same); Wikimedia Foundation Reply at 3 (any documentation only becomes relevant if the adequacy of the search comes into dispute); *see also* FMC Reply at 5 (requiring a user to upload screenshots is an “inelegant solution”).

¹³⁹ A2IM & RIAA Initial at 21; Copyright Alliance Initial at 6.

¹⁴⁰ A2IM & RIAA Initial at 17–19; Copyright Alliance Initial at 6. Copyright Alliance, A2IM, and RIAA also suggest that the user should identify whether there is another work embodied within the Pre-1972 Sound Recording, and if so, whether the user has a license to use that work. *See* A2IM & RIAA Initial at 20 & n.26; Copyright Alliance Initial at 6 & n.8. Because the noncommercial use exception does not extend to the underlying musical, literary, or dramatic work, which may require separate clearance, users are of course not required to identify underlying works embodied within the Pre-1972 Sound Recording, but may include such information, including whether they have secured permission to use such works, to aid the rights owner in considering how to respond to a NNU. *See* A2IM & RIAA Initial at 20 & n.26.

¹⁴¹ *Id.* at 17.

¹⁴² EFF Initial at 5–6 (“[R]equiring detailed descriptions of a use would invite future legal disputes over whether a use has exceeded the language of its description.”); Public Knowledge Reply at 15 (user should be required to provide only the “basic facts which a non-sophisticated user can reasonably be expected to have on hand”; rightsholders may ask for clarification of proposed uses where descriptions are vague or otherwise insufficient).

¹⁴³ EFF Reply at 4; Public Knowledge Reply at 16.

be deemed sufficient for purposes of meeting the regulatory filing requirements, while encouraging users to provide additional descriptive material that may aid in the ensuing determination whether a Pre-1972 Opt-Out Notice is filed. Specifically, the proposed rule requires the user to provide:

1. The user's full legal name, and whether the user is an individual person or corporate entity, including whether the entity is a tax-exempt organization as defined under the Internal Revenue Code;
2. The title and featured artist(s) of the Pre-1972 Sound Recording desiring to be used¹⁴⁴;
3. If known, the alternate artist name(s), alternate title(s), album title, and ISRC; and
4. A description of the proposed noncommercial use, including a summary of the project and its purpose, how the Pre-1972 Sound Recording will be used in the project, and when and where the proposed use will occur (*i.e.*, the term and U.S.-based territory of the use).

The prospective user should describe the proposed use clearly and accurately, with enough detail to provide the rights owner with enough information to meaningfully evaluate the use.¹⁴⁵ The proposed categories comprise commonsense information, and the prospective user has flexibility in the description of the proposed use.¹⁴⁶ To aid filers, the Office's form or instructions may include exemplar descriptions of the proposed use. As discussed further below, while the proposed rule does not define "noncommercial" for purposes of this filing, the Office's form, instructions, and other material will be intended to aid individuals in determining how a desired use is likely to relate to the exception for noncommercial uses.

¹⁴⁴ As noted above, classical music metadata raises unique issues. For such proposed uses, the prospective user should include information that is similar to the attributes the user is asked to search upon for title and featured artist(s) before claiming the statutory safe harbor.

¹⁴⁵ *See, e.g.*, A2IM & RIAA Initial at 18–19; EFF Initial at 5 (both in general accord).

¹⁴⁶ For example, a user may describe an "unlimited" term of use, throughout the United States, or a more limited use, such as a particular high school's spring dance recital. A user may also specify whether a webinar will be live-streamed over the internet and/or archived.

Further recognizing that some NNUs are likely to be filed by individuals or smaller noncommercial entities with limited expertise with copyright licensing, the Office's form will also provide cues for users to provide additional optional information that is commonly helpful in licensing transactions, such as spaces for title of the project, the playing time of the Pre-1972 Sound Recording to be used as well as total playing time, description of corresponding visuals in the case of audiovisual uses, and whether and how the user will credit the sound recording title, featured artist, and/or rights owner in connection with the project.¹⁴⁷ The user may also opt to include additional information about the Pre-1972 Sound Recording as permitted by the Office's form or instructions, such as the year of release and version. Similarly, to increase the likelihood of a user receiving timely notification of a rights owner's decision to opt out of a proposed noncommercial use, the proposed rule allows a user to include an email address to which a rights owner may contact the user to obtain more information, or to send a copy of the Pre-1972 Opt-Out Notice in addition to filing a Pre-1972 Opt-Out Notice with the Copyright Office.

In addition, the proposed rule states that an NNU may not include a proposed use for more than one Pre-1972 Sound Recording unless all of the sound recordings include the same featured artist and were released on the same pre-1972 album or unit of publication.¹⁴⁸ The Office recognizes that, for efficiency, users desiring to make noncommercial use of multiple Pre-1972 Sound Recordings from the same album would

¹⁴⁷ See A2IM & RIAA Initial at 19 (proposing these fields, but on a required basis).

¹⁴⁸ A "unit of publication" exists where multiple works are physically bundled or packaged together and first published as an integrated unit. U.S. Copyright Office, *Circular 34: Multiple Works*, <https://www.copyright.gov/circs/>.

prefer to file a single NNU in all cases.¹⁴⁹ The Office also recognizes, however, that multiple rights owners may own the various Pre-1972 Sound Recordings in the NNU—and that consequently, multiple rights owners may desire to file Pre-1972 Opt-Out Notices in response to the same NNU. In such circumstances, it may be difficult for rights owners as well as prospective users to evaluate opt-outs to proposed noncommercial uses.

Finally, the proposed rule also requires the individual submitting the NNU to certify that she has appropriate authority to submit the NNU, that the user desiring to make noncommercial use of the Pre-1972 Sound Recording (or the user’s agent) conducted a good faith, reasonable search within the last 90 days without finding commercial exploitation of the sound recording, and that all information submitted to the Office in the NNU is true, accurate, and complete to the best of the individual’s knowledge, information, and belief, and is made in good faith. Such requirements mimic certification requirements in a wide variety of other filings administered by the Copyright Office.¹⁵⁰ The proposed rule does not require users to submit documentation of their searches, but the Office encourages users to keep records of their searches in case they come into dispute.

2. Determining Whether a Use is Noncommercial

¹⁴⁹ Indeed, the Office permits applicants to register a claim to copyright for sound recordings on the same album in certain circumstances. *See, e.g.*, 37 CFR 202.3(b)(4)(i)(A) (allowing applicants to register multiple sound recordings as well as accompanying text and artwork as a “unit of publication,” if they are owned by the same claimant, were physically packaged or bundled together, and if all of the recordings were first published together as that integrated unit).

¹⁵⁰ *See id.* at § 201.4(c)(4) (recorded documents generally), § 201.10(f)(1)(i) (notices of termination of transfer and licenses), § 201.11(e)(9)(iii)(E) (satellite and cable statements of account), § 201.35(d)(2) (submission of Pre-1972 Schedules), § 201.36(d)(4) (submission of notices of contact information for transmitting entities publicly performing Pre-1972 Sound Recordings); *see also* 18 U.S.C. 1001 (false statements generally).

The section 1401(c) exception applies only to noncommercial uses of Pre-1972 Sound Recordings.¹⁵¹ Although section 1401(c) does not define “noncommercial,” it does state that “merely recovering costs of production and distribution of a sound recording resulting from a use otherwise permitted under [section 1401(c)] does not itself necessarily constitute a commercial use,”¹⁵² and “the fact that a person engaging in the use of a sound recording also engages in commercial activities does not itself necessarily render the use commercial.”¹⁵³ The Conference Report further states that “the concept of noncommercial use should be understood in the same way as under other provisions of title 17, such as section 107, and includes uses such as teaching, scholarship and research.”¹⁵⁴ Although other parts of title 17 refer to “commercial” or “non-commercial” uses, nowhere in the statute are they defined.¹⁵⁵

The NOI questioned whether the Office should adopt guidelines for filers “as to what constitutes a ‘noncommercial’ use, and if so, what?”¹⁵⁶ FMC strongly urged the Office to provide such guidance to “prevent situations where less sophisticated users misunderstand the statute.”¹⁵⁷ Similarly, A2IM and RIAA suggest “it is vitally important for both users and rights owners that the Office issue guidelines to help users recognize appropriate uses of section 1401(c) and help rights owners assess the NNUs that get filed,”

¹⁵¹ 17 U.S.C. 1401(c)(1); Conf. Rep. at 25 (“Subsection (c) applies only to noncommercial uses.”).

¹⁵² 17 U.S.C. 1401(c)(2)(A).

¹⁵³ *Id.* at 1401(c)(2)(B).

¹⁵⁴ Conf. Rep. at 25.

¹⁵⁵ *See, e.g.*, 17 U.S.C. 107; 108(a)(1), (c), (h)(2)(A); 109(a), (b)(1)(A); 110(4), (8); 506(a); *see also* Kernochan Center Reply at 2–3 (discussing various statutory provisions); 37 C.F.R. 201.40(b)(1)(i)(B) (2018) (regulatory exception for certain uses of motion pictures in noncommercial videos); *compare* 17 U.S.C. 901(a)(5) (defining “commercially exploit” with respect to mask works).

¹⁵⁶ NOI at 52178.

¹⁵⁷ FMC Reply at 6 (noting prevalence of incorrect understanding of copyright published by users in connection with user-uploaded content on YouTube).

particularly for users less experienced with copyright.¹⁵⁸ Citing an array of case law and endorsing a public survey on this topic from Creative Commons, they propose specific text for the Office’s consideration.¹⁵⁹

On the other hand, Wikimedia Foundation cautioned the Office to avoid creating “complex presumptions” for specific anticipated fact patterns, suggesting that terms like “noncommercial” are defined in fact-specific contexts that are still being explored by courts.¹⁶⁰ The Kernochan Center provided a run-down of key court opinions with “differing conclusions as to what constitutes commercial versus noncommercial use.”¹⁶¹ It suggested that the A2IM and RIAA proposal was insufficiently clarifying, while also acknowledging that failure to interpret the term might perpetuate conflicting interpretations by courts and advocacy groups.¹⁶²

The Office agrees with the Kernochan Center that defining noncommercial in relation to section 1401 is “a complex proposition.”¹⁶³ In a sense, section 1401(c) requires the Office to mediate a channel for users and rights owners to engage with each other regarding potentially noncommercial uses through competing filings, and it is not the Office’s intention to constrain resolution of gray areas or edge cases through private negotiation or, if necessary, the courts. If anything, the Office hopes this new mechanism may engender dialogues to further productive developments in this area.

¹⁵⁸ A2IM & RIAA Reply at 6.

¹⁵⁹ A2IM & RIAA Initial at 10–15 (citing Creative Commons, *Defining “Noncommercial”: A Study of How the Online Population Understands “Noncommercial Use”* 18 (Sept. 2009), https://mirrors.creativecommons.org/defining-noncommercial/Defining_Noncommercial_fullreport.pdf).

¹⁶⁰ Wikimedia Foundation Reply at 3.

¹⁶¹ Kernochan Center Reply at 3–4.

¹⁶² *Id.* at 4.

¹⁶³ *Id.*

But in examining the relevant statutory and case law, as well as the comments, it is apparent that there are some touchstones in evaluating whether a use is noncommercial that may be helpful to flag for filers and other interested parties. While individual determinations may be fact-specific, inclusion of this new exception suggests a congressional intent to provide a new avenue to facilitate certain noncommercial uses.¹⁶⁴ Moreover, many comments pointed out that individuals and smaller nonprofit entities may benefit from additional explanation regarding the content and filing of NNUs.¹⁶⁵ The Office plans to include information directed at helping users determine whether and how to file a NNU, including considerations that may affect their own determination that a use is noncommercial. Such material may be included on the Office’s instructions, forms, or other public resources, which will also make clear that the Office does not provide legal advice regarding specific uses. Because this information is directly tailored to the Office’s promulgation of regulations establishing the content for the filing of NNUs, and is aimed at aiding prospective filers—both users and rights owners—in evaluating whether a use may fall under this noncommercial use exemption, the Office agrees that this guidance should not necessarily be presumed to directly bear upon questions related to other parts of the statute.¹⁶⁶

While this notice is not including specific language, the Office provisionally anticipates calling attention to the following types of considerations.

¹⁶⁴ See also 17 U.S.C. 1401(c)(6)(A) (prescribing penalties for filing an NNU while “*knowing* that the use proposed is not permitted”) (emphasis added).

¹⁶⁵ See, e.g., EFF Initial at 1; AAU Initial at 1; FMC Reply at 6; Public Knowledge Reply at 9; A2IM & RIAA Reply at 6.

¹⁶⁶ See SoundExchange Initial at 15–16 (re specialized licenses for noncommercial users under sections 112 or 114); Kernochan Center Reply at 5.

1. *Use v. User*. The evaluation should consider the type of *use* of the copyrighted material and not simply the nature of the *user*.¹⁶⁷ While a filer will be asked to disclose whether the user is a tax-exempt organization or other corporate entity, this information is helpful but not dispositive, as some uses by nonprofit organizations may constitute “commercial” use.¹⁶⁸ Similarly, some uses by for-profit entities may constitute “noncommercial” use¹⁶⁹ and “the fact that a person engaging in the use of a sound recording also engages in commercial activities does not itself necessarily render the use commercial.”¹⁷⁰
2. *Educational uses*. Educational uses “such as teaching, scholarship and research” are often noncommercial uses that provide a public benefit.¹⁷¹ But some educational uses may be considered commercial, for example, when fees are charged or copies sold, or when the user gains another kind of measurable benefit (such as valuable authorship credit through plagiarism of the work), and so the educational nature of the use should be viewed as one important part of the overall evaluation whether the use is noncommercial.¹⁷²
3. *Covering the costs of production and distribution of the sound recording*. “Merely recovering costs of production and distribution of a sound recording resulting from a use” that would otherwise be considered noncommercial “does not itself necessarily constitute a commercial use.”¹⁷³ Similarly, the fact that the user may save money on a licensing fee does not automatically make the use commercial.¹⁷⁴

¹⁶⁷ See, e.g., *Cambridge Univ. Press v. Patton*, 769 F.3d 1232, 1264 (11th Cir. 2014) (“[W]e must consider not only the nature of the user, but the use itself.”); *Am. Geophysical Union v. Texaco Inc.*, 60 F.3d 913, 921–22 (2d Cir.1994) (“[A] court’s focus should be on the use of the copyrighted material and not simply on the user . . .”).

¹⁶⁸ See, e.g., *Greenberg v. Nat’l Geographic Soc’y*, 244 F.3d 1267, 1275 (11th Cir. 2001), *rev’d on other grounds on reh’g en banc*, 533 F.3d 1244 (11th Cir. 2008). (“[W]hile the [CD-ROM library] is a product that may serve educational purposes, it is marketed to the public at book stores, specialty stores, and over the Internet. [Defendant] is a non-profit organization, but its subsidiary National Geographic Enterprises, which markets and distributes the [product], is not; the sale of the [product] is clearly for profit.”).

¹⁶⁹ See, e.g., *Am. Geophysical Union*, 60 F.3d at 921–22; *Byrne v. British Broad. Corp.*, 132 F. Supp. 2d 229, 234 (S.D.N.Y. 2001).

¹⁷⁰ 17 U.S.C. 1401(c)(2)(B).

¹⁷¹ Conf. Rep. at 25.

¹⁷² See, e.g., *Peter Letterese & Assocs. v. World Inst. of Scientology Enters. Int’l*, 533 F.3d 1287, 1309–12 (11th Cir. 2008) (finding use of copyrighted material in an instructional coursepack, where defendants charged a fee, was “commercial”); *Princeton Univ. Press v. Mich. Document Servs.*, 99 F.3d 1381, 1385–86 (6th Cir. 1996) (finding reproduction of academic works was “commercial” use because copies were sold in coursepacks); *Weissman v. Freeman*, 868 F.2d 1313, 1324 (2d Cir. 1989) (academic researcher’s plagiarism was commercial because “what is valuable is recognition because it so often influences professional advancement”); see also *Cambridge Univ. Press*, 769 F.3d at 1263–66.

¹⁷³ 17 U.S.C. 1401(c)(2)(A).

¹⁷⁴ See, e.g., *Cambridge Univ. Press*, 769 F.3d at 1265–66 (“Of course, any unlicensed use of copyrighted material profits the user in the sense that the user does not pay a potential licensing

4. *Financial gain or other profit.* Beyond covering the costs of production and distribution, if the user otherwise “stands to profit from exploitation of the copyrighted material without paying the customary price,” it is more likely to be considered a commercial use.¹⁷⁵ For example, some courts have stated that if the use can be expected to bring the user “conspicuous financial rewards,” it is more likely to be commercial.¹⁷⁶ Some examples may include uses of a copyrighted work in an advertisement, through the sale of a newspaper or magazine (even by a non-profit organization), or other uses that directly earn users money.¹⁷⁷
5. *Private personal uses.* If the use is a private home use for an individual’s personal enjoyment, it will generally be considered noncommercial.¹⁷⁸ Posting on the open, accessible internet is not a private use, even if the user does not encourage others to access the Pre-1972 Sound Recording.
6. *Other individual uses.* Putting a Pre-1972 Sound Recording on YouTube or another platform that allows users to upload content may or may not be commercial; again, the user must consider the purpose of the use, including whether the user is monetizing that use for profit.¹⁷⁹

fee, allowing the user to keep his or her money. If this analysis were persuasive, no use could qualify as ‘nonprofit’ . . .”).

¹⁷⁵ *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 562 (1985); *see also Wall Data Inc. v. Los Angeles Cty. Sheriff’s Dep’t*, 447 F.3d 769, 779 (9th Cir. 2006) (police department copying software to avoid buying additional licenses was a commercial use).

¹⁷⁶ *Cambridge Univ. Press*, 769 F.3d at 1266; *see Am. Geophysical Union*, 60 F.3d at 922.

¹⁷⁷ *See, e.g., Davis v. The Gap, Inc.*, 246 F.3d 152, 175 (2d Cir. 2001) (“Here the work, being an advertisement, is at the outer limit of commercialism.”) (citing *Campbell*, 510 U.S. at 585); *Hustler Magazine, Inc. v. Moral Majority, Inc.*, 796 F.2d 1148, 1152 (9th Cir. 1986) (use in fundraisers for religious organization is commercial); *Sony Comput. Entm’t Am., Inc. v. Bleem, LLC*, 214 F.3d 1022, 1027 (9th Cir. 2000) (finding use of screen shots of plaintiff’s video games in comparative advertising was commercial); *Consumers Union of U.S., Inc. v. Gen. Signal Corp.*, 724 F.2d 1044, 1049 (2d Cir. 1983) (“Almost all newspapers, books and magazines are published by commercial enterprises that seek a profit.”); *see also Perfect 10 v. Google, Inc.*, 416 F. Supp. 2d 828, 846 (C.D. Cal. 2006), *aff’d in part, rev’d in part sub nom on other grounds*, 508 F.3d 1146 (9th Cir. 2006).

¹⁷⁸ *See Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 448–49 (1984) (“time-shifting for private home use must be characterized as a noncommercial, nonprofit activity”); *Recording Indus. Ass’n of Am. v. Diamond Multimedia Sys., Inc.*, 180 F.3d 1072, 1079 (9th Cir. 1999) (addressing transfer of legitimately-acquired MP3 files from user’s hard drive to portable media player); *see also* A2IM & RIAA Initial at 13 (acknowledging that “use of lawfully-acquired works for an individual’s personal enjoyment clearly seems to be noncommercial”).

¹⁷⁹ For example, making copies to help people “get for free something they would ordinarily have to buy,” such as file sharing to anonymous requesters over the internet, has been found to be commercial. *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1015 (9th Cir. 2001); *see also* FMC Reply at 6 (expressing “acute concern” about uploads to “YouTube or similar commercial services”).

Finally, the Copyright Office also addresses a question raised regarding the scope of its regulatory authority. EFF and Public Knowledge contend the Office lacks authority to issue guidance regarding the meaning of “noncommercial use” as part of this rulemaking.¹⁸⁰ Perhaps more broadly, EFF suggests that the Copyright Office requires “a statutory grant” “to give opinions” regarding copyright issues or the meaning of specific terms in the copyright law.¹⁸¹ In point of fact here, three relevant statutory charges reside at 17 U.S.C. 701(b), 702, and 1401(c)(3).¹⁸² It is well-established, permissible, and often necessary for the Office to construe or otherwise interpret the meaning of statutory terms as part of dutifully exercising its regulatory functions.¹⁸³ Indeed, this is a basic precept of administrative law.¹⁸⁴ As Congress has so directed, the Office will continue to interpret

¹⁸⁰ Public Knowledge Initial at 8 (suggesting statute provides “no role” for the Office); EFF Initial at 5; *see also* Wikimedia Foundation Reply at 3.

¹⁸¹ EFF Initial at 5 (citation omitted).

¹⁸² 17 U.S.C. 701(b) (outlining additional functions and duties), 702 (Copyright Office regulations), and 1401(c)(3) (directing promulgation of noncommercial use rulemaking). *See also* S. Rep. No. 115-339 at 15 (discussing Copyright Office knowledge and expertise regarding music copyright regulations, educational activities, and reports with respect to title I of the MMA); Conf. Rep. at 12 (same). The Office also provides authoritative information about the copyright law and public education regarding copyright and the administration of its functions and duties under title 17. *See* 17 U.S.C. 701(b); 37 CFR 203.3(f); *id.* at § 201.2(b)(7).

¹⁸³ *See, e.g.*, 37 CFR 201.4(c)(2) (defining a document “pertaining to a copyright”), § 201.10(d)(2) (identifying actions that will meet statutory service requirements), § 201.10(f)(1)(ii)(C) (treating date of creation of a “gap work” as date of execution of a grant), § 201.11 (including interest in Section 119 royalty fee payments), § 201.13(a)(2) (defining “copyright owner” for purposes of Section 110(4)), § 201.17(b) (defining “gross receipts” and “cable system” for purposes of Section 111), § 201.18(a)(5) (defining “copyright owner” for purposes of Section 115 notices of intention), § 201.22(a)(2) (defining “copyright owner” for purposes of Section 411(c)), 201.26(b) (defining terms relating to shareware for purpose of Section 805 of Public Law 101-650), § 202.1 (providing examples of works not subject to copyright), § 202.10 (requirements for protection of pictorial, graphic, and sculptural works), § 201.11(b)(2) (defining “building” for purposes of architectural works protection); *see also* *Mazer v. Stein*, 347 U.S. 201, 211–13 (1954) (relying on Copyright Office regulations “interpreting” the 1909 Act with respect to copyrightable subject matter).

¹⁸⁴ *See, e.g.*, *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984); *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). Relatedly, EFF’s citation of *Capitol Records, LLC v. Vimeo, LLC* seems misplaced in comments responsive to a statutorily-required

statutory terms as necessary to administer a wide variety of filings mandated under title 17, including NNUs, and also through documents such as circulars, its *Compendium of U.S. Copyright Office Practices*, or other public aids.¹⁸⁵ While it is true that courts afford varying levels of deference to these differing types of documents (as with any agency), that fact does not bear upon the Office’s authority to issue these documents in fulfillment of its statutory functions and duties.

ii. Filing of NNUs, including Copyright Office review.

Stakeholders disagree on the Office’s level of review of NNUs. Copyright Alliance, A2IM, and RIAA contend that the Office should reject NNUs that do not provide sufficient information or are “patently deficient.”¹⁸⁶ In addition, Copyright Alliance and FMC ask for guidance on how the Office plans to police bad faith or

rulemaking regarding a new federal exception to the ability of rights owners to control uses of Pre-1972 Sound Recordings. *See* EFF Initial at 5 (citing 826 F.3d 78, 93 (2d Cir. 2016)). First, as the sentence that EFF partially quotes indicates, *Vimeo* actually suggests that *Chevron* deference is appropriate with respect to a Copyright Office rulemaking (such as this one). *Vimeo*, 826 F.3d at 93 (distinguishing level of deference in that case from “*Chevron* deference of the sort accorded to rulemaking by authorized agencies”). Indeed, the Second Circuit has “appl[ie]d *Chevron*” in adopting the Office’s interpretation of section 111 as reasoned through similar rulemaking documents concerning requirements for filing statements of account with respect to the cable license, when determining whether internet retransmission services may qualify for this license. *WPIX, Inc. v. ivi, Inc.*, 691 F.3d 275, 284 (2d Cir. 2012). Second, far from discounting the Office’s guidance in this area, Congress subsequently ratified the approach recommended in the policy report discussed in *Vimeo* of expressly amending title 17 to apply the section 512 safe harbor as well as other federal exceptions and limitations to Pre-1972 Sound Recordings. *See* 17 U.S.C. 1401(f)(3); (1)(B)(3); Pre-1972 Sound Recordings Report at 128–29, 130–32; *see also* Mitch Stoltz, *The New Music Modernization Act Has a Major Fix: Older Recordings Will Belong to the Public, Orphan Recordings Will Be Heard Again*, EFF (Sept. 19, 2018), <https://www.eff.org/deeplinks/2018/09/new-music-modernization-act-has-major-fix-older-recordings-will-belong-public> (noting it is “important” that under title II, “the full set of public rights and protections” “will apply explicitly,” in contrast to state laws).

¹⁸⁵ *See, e.g., Compendium (Third)* Introduction 2 (collecting cases relying on *Compendium*); *ABS Entm’t, Inc. v. CBS Corp.*, 908 F.3d 405, 417 n.5 (9th Cir. 2018) (“Circulars provide Copyright Office guidance on various issues. We may rely on them as persuasive but not binding authority.”).

¹⁸⁶ A2IM & RIAA Initial at 19; Copyright Alliance Initial at 3.

deficient notices.¹⁸⁷ By contrast, EFF maintains that the Office cannot reject facially complete notices of use or opt-out notices,¹⁸⁸ and Public Knowledge contends that section 1401(c) “contemplates no such role for the Office” to reject notices on substantive grounds.¹⁸⁹

As with similar types of filings made with the Office, the proposed rule states that the Office does not review NNUs for legal sufficiency.¹⁹⁰ Rather, the Office’s review is limited to whether the formal and legal procedural requirements established under the rule (including completing the required information and payment of the proper filing fee) have been met. The Office’s indexing of an NNU thus does not mean the proposed use in the NNU is, in fact, noncommercial. Users are therefore cautioned to review and scrutinize NNUs to assure their legal sufficiency before submitting them to the Office.

Section 1401(c)(6)(A) contemplates civil penalties for the filing of fraudulent NNUs (*e.g.*, fraudulently describing the use proposed).¹⁹¹ In connection with the Office’s exercise of the regulatory authority directed under the MMA and its general authority and

¹⁸⁷ Copyright Alliance Initial at 3; FMC Reply at 5.

¹⁸⁸ EFF Reply at 3.

¹⁸⁹ Public Knowledge Reply at 7. The Copyright Alliance maintains that the “Copyright Office does clearly have authority to deny facially invalid notices,” and the discretion to reject notices which on their face are not sufficient to identify the sound recording—thus not providing notice to the owner of the sound recording—and nature of the use or do not adhere to the form, content, and procedures established by the Register through regulations.” Copyright Alliance Reply at 2.

¹⁹⁰ For example, the Office accepts statements of account under the section 111 cable license after a review for “obvious errors or omissions appearing on the face of the documents” (*see* 37 CFR 201.17(c)(2)), notices of intention under the section 115 compulsory license without review for “legal sufficiency” or “errors or discrepancies” (*see id.* at § 201.18(g)), and agent designations made pursuant to section 512(c)(2) without any examination.

¹⁹¹ 17 U.S.C. 1401(c)(6)(A) (“Any person who willfully engages in a pattern or practice of filing a [NNU] . . . fraudulently describing the use proposed, or knowing that the use proposed is not permitted under [section 1401(c)], shall be assessed a civil penalty in an amount that is not less than \$250, and not more than \$1000, for each such notice, in addition to any other remedies that may be available under this title based on the actual use made.”).

responsibility to administer title 17,¹⁹² the proposed rule states that if the Register becomes aware of abuse or fraudulent NNUs from a certain filer, she shall have the discretion to reject all submissions from that filer under section 1401(c) for up to one year.

iii. Indexing NNUs into the Copyright Office’s online database.

Section 1401(c) requires NNUs to be “indexed into the public records of the Copyright Office.”¹⁹³ Under the proposed rule, an NNU will be considered “indexed” once it is made publicly available through the Office’s online database of NNUs. Similar to the Office’s database of indexed Pre-1972 Schedules, the Office intends to provide an online and searchable database of indexed NNUs. Rights owners can search on the prospective user’s name, the title of the sound recording, the featured artist(s), and the ISRC provided in NNUs.¹⁹⁴ In addition, each NNU will be assigned a unique identifier by the Copyright Office, which will also be searchable. As noted below, rights owners will be required to include the unique identifier assigned to an NNU if the rights owner desires to file a Pre-1972 Opt-Out Notice in response. Although indexed NNUs will be publicly available, the proposed rule states that users cannot rely on NNUs filed by third parties (other than the user’s agent). Similarly, a user cannot rely on her own NNU once the proposed term of use ends (*i.e.*, she must conduct a new good faith, reasonable search for the Pre-1972 Sound Recording and file a new NNU).

The proposed rule also confirms that persons may request timely notification of when NNUs are indexed into the Office’s public records by following the instructions

¹⁹² See *id.* at 1401(c)(3), (5)(A); *id.* at 701(a).

¹⁹³ *Id.* at 1401(c)(1)(C); see Internet Archive Initial at 2 (advocating same).

¹⁹⁴ Similar to the database of Pre-1972 Schedules discussed above, the Office’s database of NNUs will allow for wildcard searching by using an asterisk to fill in partial words.

provided by the Copyright Office on its website.¹⁹⁵ Individuals requesting such notification can subscribe to a weekly email through a service similar to the Office’s NewsNet service, which will provide a link to the Office’s online database of indexed NNUs. The Office’s searchable database will default to listing the NNUs with the most recent index dates first, so individuals should easily be able to identify recently indexed filings.¹⁹⁶

C. Opt-Out Notices

As noted above, the rights owner of a Pre-1972 Sound Recording may file a Pre-1972 Opt-Out Notice with the Copyright Office “opting out” of (*i.e.*, objecting to) the proposed use in an NNU within 90 days of the NNU being indexed into the Office’s public records.¹⁹⁷ The proposed rule states that where a Pre-1972 Sound Recording has multiple rights owners, only one rights owner needs to file Pre-1972 Opt-Out Notice for purposes of section 1401(c)(5).¹⁹⁸ In addition, the proposed rule requires the Pre-1972 Opt-Out Notice to include the rights owner’s name and the unique identifier assigned to the NNU by the Copyright Office. The submitter of the Pre-1972 Opt-Out Notice may opt in her discretion to comment on whether the proposed use constitutes noncommercial use. In keeping with filings of similar type, the Pre-1972 Opt-Out Notice must also include a certification that the individual submitting the notice has appropriate authority

¹⁹⁵ See A2IM & RIAA Initial at 22 (requesting same).

¹⁹⁶ The Office believes having an online, searchable database of indexed NNUs and a periodic email notification option addresses Author Services’ concern about how rights owners of Pre-1972 Sound Recordings will receive notice of indexed NNUs. Author Services Reply #1 at 1–2.

¹⁹⁷ 17 U.S.C. 1401(c)(1)(C).

¹⁹⁸ Similarly, where a musical work has multiple copyright owners, the Office does not require each copyright owner to record a Declaration of Ownership in Musical Works to become eligible for royalties under the 17 U.S.C. 115 compulsory license. U.S. Copyright Office, *Document Recordation: Completing and Submitting Declarations of Ownership in Musical Works* (last visited Jan. 28, 2019), <https://www.copyright.gov/recording/domw/#requirements>.

to do so and that all information submitted to the Office is true, accurate, and complete to the best of the individual's knowledge, information, and belief, and is made in good faith. The Office intends to make Pre-1972 Opt-Out Notices publicly available through the Office's online searchable database of NNUs.

If a rights owner files a timely Pre-1972 Opt-Out Notice, the proposed rule states that the user specified in the NNU use must wait one year before filing another NNU for the same or similar use of the Pre-1972 Sound Recording.

As with NNUs and similar types of filings made with the Office, the proposed rule states that the Office does not review Pre-1972 Opt-Out Notices for legal sufficiency, interpret their content, or screen them for errors or discrepancies. Rather, the Office's review is limited to whether the procedural requirements established by the Office (including payment of the proper filing fee) have been met. Rights owners are therefore cautioned to review and scrutinize Pre-1972 Opt-Out Notices to assure their legal sufficiency before submitting them to the Office. As with the Office's handling of fraudulent NNUs, because section 1401(c)(6)(B)(ii) contemplates civil penalties for a pattern of filing of fraudulent Pre-1972 Opt-Out Notices,¹⁹⁹ the proposed rule states that if the Register becomes aware of abuse or fraudulent Pre-1972 Opt-Out Notices from a certain filer, she shall have the discretion to reject all submissions from that filer for up to one year.

D. Filing Fees

¹⁹⁹ 17 U.S.C. 1401(c)(6)(B)(ii) ("Any person who engages in a pattern or practice of [filing a Pre-1972 Opt-Out Notice, knowing that the person is not the rights owner or authorized to act on behalf of the rights owner of the sound recording to which the NNU pertains,] shall be assessed a civil penalty in an amount not less than \$10,000 for each such filing."); *see also* 17 U.S.C. 1401(c)(5)(A); *id.* at 701(a).

The Copyright Act grants the Office authority to establish, adjust, and recover fees for services provided to the public.²⁰⁰ The rule proposes fees to file an NNU or an Opt-Out Notice that are the same as the current fee to record a notice of intention to make and distribute phonorecords under section 115 (“NOI”).²⁰¹ The Office anticipates that the processing of these documents will be analogous to that of processing electronic NOIs, and has based the proposed fee accordingly.²⁰² Similar to the Office’s free NewsNet service, there will be no fee for individuals to request and receive timely notifications of when NNUs are indexed into the Office’s public records.

III. *Ex Parte* Communications

In the past, the Office’s communications with rulemaking participants have not generally included discussions about the substance of the proceeding apart from the noticed phases of written comments. The Office has determined that further informal communications with participants might be beneficial in limited circumstances where the Office seeks specific information or follow-up regarding the public record, such as to discuss nuances of proposed regulatory language. The primary means to communicate views in the course of the rulemaking will continue to be through the submission of

²⁰⁰ *See id.* at 708. Because they do not involve services specified in section 708(a), the fees proposed in this NPRM are not subject to the adjustment of fees provision in section 708(b).

²⁰¹ 37 CFR 201.3(e)(1) (stating cost to record section 115 NOI for one title is \$75). The Office notes that the proposed fee is lower than to record a document for a single title. *See id.* at § 201.3(c)(17) (stating cost to record document for single title is \$105).

²⁰² Basing the cost of a service on the cost for a similar service is appropriate. *See* Copyright Office Fees, 83 FR 24054, 24059 (May 24, 2018) (proposing setting new fees at the same level for “analogous” services). In 2017, Booz Allen Hamilton conducted a study of the Office’s most recent fee structure. When asked whether existing rates could be leveraged for new group registration options, it concluded it was appropriate if the work required was of a similar grade and compensation level. Booz Allen Hamilton, U.S. Copyright Office, Fee Study: Question and Answers 6 (Dec. 2017), https://www.copyright.gov/rulemaking/feestudy2018/fee_study_q&a.pdf.

written comments. In other words, this communication will supplement, not substitute for, the preexisting record.

To ensure that such communications are governed by transparent and consistent procedures, the Office is issuing the following guidelines, which may be supplemented by information on the Copyright Office's website at

<https://www.copyright.gov/rulemaking/pre1972-soundrecordings-noncommercial/>:

1. Any interested participant seeking an *ex parte* in-person or telephone meeting with the Office in this proceeding should submit a written request to the persons identified in the contact information section of this NPRM. The request should identify the names of all proposed attendees, and the party or parties on whose behalf each attendee is appearing.
2. *Ex parte* meetings with the Office are intended to provide an opportunity for participants to clarify evidence and/or arguments made in prior written submissions, and to respond to questions from the Office on those matters. The Office will generally not consider or accept new documentary materials outside the rulemaking record.
3. Within two business days after the meeting, the attendees must email the Office (using the above email addresses) a letter detailing the information identified in paragraph 1 and summarizing the discussion at the meeting. The letter must summarize the substance of the views expressed and arguments made in such a way that a non-participating party will understand the scope of issues discussed; merely listing the subjects discussed or providing a 1-2 sentence description will

not be sufficient. These letters will be made publicly available on the Copyright Office’s website.

- 4. To ensure compliance with the statutory deadline, all *ex parte* meetings in this proceeding must take place no later than Friday, March 22, 2019. The Office will not consider requests to hold meetings after that date.

List of Subjects in 37 CFR Part 201

Copyright, General provisions.

Proposed Regulations

In consideration of the foregoing, the U.S. Copyright Office proposes amending 37 CFR part 201 as follows:

PART 201—GENERAL PROVISIONS

- 1. The authority citation for part 201 continues to read as follows:

Authority: 17 U.S.C. 702.

- 2. Amend § 201.3 as follows:
 - a. Redesignate paragraphs (c)(21) and (c)(22) as paragraphs (c)(23) and (c)(24), respectively.
 - b. Add paragraphs (c)(21) and (c)(22) to read as follows:

§ 201.3 Fees for registration, recordation, and related services, special services, and services performed by the Licensing Division.

* * * * *

(c) * * *

	Fees
Registration, recordation and related services	(\$)

	* * * * * * *	
(21) Notice of noncommercial use of pre-1972 sound recording		75
(22) Opt-out notice of noncommercial use of pre-1972 sound recording		75
	* * * * * * *	

* * * * *

3. Amend § 201.4 as follows:

a. Revise paragraph (b)(3).

b. Revise paragraph (b)(10) by removing “; and” and replacing with “;”.

c. Revise paragraphs (b)(11), (b)(12), and (b)(13) by removing the period at the end of each paragraph and replacing with a semicolon.

d. Add paragraphs (b)(14) and (b)(15).

The additions and revisions read as follows:

§ 201.4 Recordation of transfers and other documents pertaining to copyright.

* * * * *

(b) * * *

(3) Notices of use of sound recordings under statutory license and notices of intention to obtain a compulsory license to make and distribute phonorecords of nondramatic musical works (17 U.S.C. 112(e), 114, and 115(b); see §§201.18, 370.2 of this chapter);

* * * * *

(14) Notices of noncommercial use of pre-1972 sound recordings (17 U.S.C. 1401(c)(1)(B); see §201.37); and

(15) Opt-out notices of noncommercial use of pre-1972 sound recordings (17 U.S.C. 1401(c)(1)(C); see §201.37).

* * * * *

4. Add § 201.37 to read as follows:

§ 201.37 Noncommercial use of pre-1972 sound recordings

(a) *General.* This section prescribes the rules under which a user, desiring to make noncommercial use of a pre-1972 sound recording pursuant to 17 U.S.C. 1401(c), conducts a good faith, reasonable search to determine whether the sound recording is being commercially exploited, and if not, files a notice of noncommercial use with the Copyright Office. This section also prescribes the rules under which a rights owner of a pre-1972 sound recording identified in a notice of noncommercial use may file an opt-out notice opposing a proposed use of the sound recording, pursuant to 17 U.S.C. 1401(c)(1)(C).

(b) *Definitions.* For purposes of this section:

(1) Unless otherwise specified, the terms used have the meanings set forth in 17 U.S.C. 1401.

(2) A *pre-1972 sound recording* is a sound recording fixed before February 15, 1972.

(3) For pre-1972 sound recordings of classical music, including opera:

(i) the *title* of the pre-1972 sound recording means, to the extent applicable and known by the user, any and all title(s) of the sound recording and underlying musical composition known to the user, and the composer and opus or catalogue number(s) of the underlying musical composition; and

(ii) the *featured artist(s)* of the pre-1972 sound recording means, to the extent applicable and known by the user, the featured soloist(s); featured ensemble(s); featured conductor; and any other featured performer(s).

(c) *Conducting a good faith, reasonable search.*

(1) Pursuant to 17 U.S.C. 1401(c)(3)(A), a user desiring to make noncommercial use of a pre-1972 sound recording should search for the sound recording in each of the categories below until the user finds the sound recording. If the user does not find the pre-1972 sound recording after searching the categories below, her search is sufficient for purposes of the safe harbor in 17 U.S.C. 1401(c)(4), establishing that she made a good faith, reasonable search without finding commercial exploitation of the sound recording by or under the authority of the rights owner. The categories are:

- (i) Searching the Copyright Office’s database of indexed schedules listing right owners’ pre-1972 sound recordings (<https://www.copyright.gov/music-modernization/pre1972-soundrecordings/search-soundrecordings.html>);
- (ii) Searching at least one major search engine, namely Google, Yahoo!, or Bing, to determine whether the pre-1972 sound recording is being offered for sale in download form or as a new (not resale) physical product, or is available through a streaming service;
- (iii) Searching at least one of the following streaming services: Amazon Music Unlimited, Apple Music, Spotify, or TIDAL;
- (iv) Searching SoundExchange’s repertoire database through the SoundExchange ISRC lookup tool (<https://isrc.soundexchange.com/#!/search>);
- (v) Searching at least one major seller of physical product, namely Amazon.com, and if the pre-1972 sound recording is of classical music or jazz, searching a smaller online

music store that specializes in product relative to that niche genre, namely: ArkivJazz, ArkivMusic, Classical Archives, or Presto; in either case, to determine whether the pre-1972 sound recording is being offered for sale in download form or as a new (not resale) physical product; and

(vi) For pre-1972 ethnographic sound recordings of Alaska Native or American Indian tribes or communities, searching, if such contact information is known to the user, by contacting the relevant Alaska Native or American Indian tribe and the holding institution of the sound recording (such as a library or archive) to gather information to determine whether the sound recording is being commercially exploited. If this contact information is not previously known to the prospective user, the user should use the information provided by the National Congress of American Indians (NCAI) tribal directory to contact the relevant tribe or NCAI itself (<http://www.ncai.org/tribal-directory>).

(2) A search under paragraph (c)(1) of this section must include searching the title of the pre-1972 sound recording and its featured artist(s). If the user knows any of the following attributes of the sound recording, and the source being searched has the capability for the user to search any of the following attributes, the search must also include searching: alternate artist name(s), alternate title(s), album title, and the International Standard Recording Code (“ISRC”). A user is encouraged, but not required, to search additional known attributes, such as the label, version, or Universal Product Code (“UPC”).

(3) A search under paragraph (c)(1) of this section must be conducted within 90 days of the user (or her agent) filing a notice of noncommercial use under paragraph (d)(1) of this section to be sufficient for purposes of the safe harbor in 17 U.S.C. 1401(c)(4).

(4) For purposes of the safe harbor in 17 U.S.C. 1401(c)(4)(A), a user cannot rely on:

- (i) A search conducted under paragraph (c)(1) of this section by a third party who is not the user's agent; or
- (ii) A notice of noncommercial use filed under paragraph (d)(1) of this section by a third party (who is not the user's agent) to which the rights owner does not file an opt-out notice.

(d) *Notices of noncommercial use.*

(1) *Form and submission.* A user seeking to comply with 17 U.S.C. 1401(c)(1) must submit a notice of noncommercial use identifying the pre-1972 sound recording that the user intends to use and the nature of such use using an appropriate form provided by the Copyright Office on its website and following the instructions provided on the Office's website or the form itself. The Office may reject any submission that fails to comply with the requirements of this section, or any relevant instructions or guidance provided by the Office.

(2) *Content.* A notice of noncommercial use shall contain the following:

- (i) The user's full legal name, and whether the user is an individual person or corporate entity, including whether the entity is a tax-exempt organization as defined under the Internal Revenue Code. Additional contact information, including an email address, may be optionally provided.
- (ii) The title and featured artist(s) of the pre-1972 sound recording desiring to be used.
- (iii) If any are known to the user, the alternate artist name(s), alternate title(s), album title, and International Standard Recording Code (ISRC).
- (iv) The user may include additional optional information about the pre-1972 sound recording as permitted by the Office's form or instructions, such as the year of release.

(v) A description of the proposed noncommercial use, including a summary of the project and its purpose, how the pre-1972 sound recording will be used in the project, and when and where the proposed use will occur (*i.e.*, the term and U.S.-based territory of the use). The user may include additional optional information detailing the proposed use, such as the tentative title of the project, the playing time of the pre-1972 sound recording to be used as well as total playing time, description of corresponding visuals in the case of audiovisual uses, and whether and how the user will credit the sound recording title, featured artist, and/or rights owner in connection with the project.

(vi) A certification that the user searched but did not find the pre-1972 sound recording in a search conducted under paragraph (c) of this section.

(vii) A certification that the individual submitting the notice of noncommercial use has appropriate authority to submit the notice, that the user desiring to make noncommercial use of the pre-1972 sound recording (or the user's agent) conducted a search under paragraph (c) within the last 90 days without finding commercial exploitation of the sound recording, and that all information submitted to the Office is true, accurate, and complete to the best of the individual's knowledge, information, and belief, and is made in good faith.

(3) *U.S.-based territory*. Noncommercial use of a pre-1972 recording under this section is limited to use within the United States.

(4) *Number of sound recordings*. A notice of noncommercial use may not include proposed use for more than one pre-1972 sound recording unless all of the sound recordings include the same featured artist(s) and were released on the same pre-1972 album or unit of publication.

(5) *Unique identifier.* The Copyright Office will assign each indexed notice of noncommercial use a unique identifier to identify the notice in the Office's public records.

(6) *Legal sufficiency.*

(i) The Copyright Office does not review notices of noncommercial use submitted under paragraph (d)(1) of this section for legal sufficiency. The Office's review is limited to whether the procedural requirements established by the Office (including payment of the proper filing fee) have been met. The fact that the Office has indexed a notice is not a determination by the Office of the notice's validity or legal effect. Indexing by the Copyright Office is without prejudice to any party claiming that the legal or formal requirements for making a noncommercial use of a pre-1972 sound recording have not been met, including before a court of competent jurisdiction. Users are therefore cautioned to review and scrutinize notices of noncommercial use to assure their legal sufficiency before submitting them to the Office.

(ii) If a rights owner does not file an opt-out notice under paragraph (e) of this section, when the term of use specified in the notice of noncommercial use ends, the user must cease noncommercial use of the pre-1972 sound recording for purposes of remaining in the safe harbor in 17 U.S.C. 1401(c)(4). Should the user desire to requalify for the safe harbor with respect to that same pre-1972 sound recording, the user must conduct a new search and file a new notice of noncommercial use under paragraphs (c) and (d) of this section, respectively.

(7) *Filing date.* The date of filing of a notice of noncommercial use is the date when a proper submission, including the prescribed fee, is received in the Copyright Office. The

filing date may not necessarily be the same date that the notice, for purposes of 17 U.S.C. 1401(c)(1)(C), is indexed into the Office's public records.

(8) *Fees.* The filing fee to submit a notice of noncommercial use pursuant to this section is prescribed in §201.3(c).

(9) *Third-party notification.* A person may request timely notification of filings made under paragraph (d)(1) of this section by following the instructions provided by the Copyright Office on its website.

(e) *Opt-out notices.*

(1) *Form and submission.* A rights owner seeking to comply with 17 U.S.C. 1401(c)(1)(C) must file a notice opting out of a proposed noncommercial use of a pre-1972 sound recording filed under paragraph (d)(1) of this section using an appropriate form provided by the Copyright Office on its website and following the instructions for completion and submission provided on the Office's website or the form itself. The Office may reject any submission that fails to comply with the requirements of this section, or any relevant instructions or guidance provided by the Office.

(2) *Content.* An opt-out notice use shall contain the following:

(i) The rights owner's name and the unique identifier assigned to the notice of noncommercial use by the Copyright Office. Additional contact information, including an email address, may be optionally provided.

(ii) A certification that the individual submitting the opt-out notice has appropriate authority to submit the notice and that all information submitted to the Office is true, accurate, and complete to the best of the individual's knowledge, information, and belief, and is made in good faith.

(iii) Submission of an opt-out notice does not constitute agreement by the rights owner or the individual submitting the opt-out notice that the proposed use is in fact noncommercial. The submitter may choose to comment upon whether the rights owner agrees that the proposed use is noncommercial use, but failure to do so does not constitute agreement that the proposed use is in fact noncommercial.

(3) *Multiple rights owners.* Where a pre-1972 sound recording has multiple rights owners, only one rights owner needs to file an opt-out notice for purposes of 17 U.S.C. 1401(c)(5).

(4) *Effect of opting out.* If a rights owner files a timely opt-out notice under paragraph (e)(1) of this section, the user must wait one year before filing another notice of noncommercial use proposing the same or similar use of the same pre-1972 sound recording(s).

(5) *Legal sufficiency.* The Copyright Office does not review opt-out notices submitted under paragraph (e)(1) of this section for legal sufficiency. The Office's review is limited to whether the procedural requirements established by the Office (including payment of the proper filing fee) have been met. Rights owners are therefore cautioned to review and scrutinize opt-out notices to assure their legal sufficiency before submitting them to the Office.

(6) *Filing date.* The date of filing of an opt-out notice is the date when a proper submission, including the prescribed fee, is received in the Copyright Office.

(7) *Fee.* The filing fee to submit an opt-out notice pursuant to this section is prescribed in §201.3(c).

(f) *Fraudulent filings.* If the Register becomes aware of abuse or fraudulent filings under this section by or from a certain filer or user, she shall have the discretion to reject all submissions from that filer or user under this section for up to one year.

Dated: January 30, 2019.

Regan A. Smith,
General Counsel and
Associate Register of Copyrights.

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